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[B-212887]

Small Business Administration—Loans—Interest

Small Business Administration (SBA) is authorized to pay interest on funds SBA requested the guaranteed lender to advance to purchase property at a foreclosure sale to preserve SBA's security interest in the property being sold. Government may pay interest on unpaid debts pursuant to a valid statutory or contractual provision committing it to do so. SBA's agreement to reimburse the lender for SBA's share of the principal amount advanced, plus accured interest, is within SBA's broad statutory authority under 15 U.S.C. 633(c)(5)(A) to take any and all actions deemed necessary in liquidating or otherwise dealing with or realizing on loans made under the Act.

Matter of: SBA's Authority to Pay Interest on Funds Advanced by Bank at SBA's Request, July 2, 1984:

This decision is in response to a request from Certifying Officer, John E. Lagos, Director, Office of Accounting Operations, Small Business Administration (SBA) for a legal opinion from our Office as to SBA's authority to pay Citizens Bank of Ogden, Utah, (Bank) the sum of $3,565.92 [1] representing the Bank's interest charges on moneys SBA requested the Bank to advance to purchase property at a foreclosure sale. As we explain below, SBA is authorized to pay the claim in question.

BACKGROUND

After a default by the borrower on his SBA-guaranteed loan, SBA purchased 90 percent of the guaranteed loan from the lender bank as it was legally obligated to do under the terms of the guarantee. As is customary, SBA then assumed the loan servicing responsibilities, placed the loan in liquidation, and proceeded to dispose of personal property collateral from the borrower. The bank retained a 10 percent interest in the loan and any subsequent recoveries thereunder by SBA.

The borrower's house, which served as further security for the loan, was subject to a prior lien held by a third party. The first lienholder scheduled a foreclosure sale of the property on October 19, 1982. For some "unexplained reason," the SBA Field Office was unable to obtain a Treasury check through normal channels in time to submit a "Protective Bid" at the foreclosure sale. When the first lienholder indicated that it was unwilling to extend the date of the foreclosure sale, "SBA requested the participating bank to fund a protective purchase of the property." The Bank agreed to do so provided that SBA agreed to reimburse the Bank for SBA's 90 percent share of the purchase price plus interest on that amount until the Bank was reimbursed. On October 14, 1982, SBA's bid, using funds advanced by the Bank, was accepted and the property

[1] The total of $3,565.92 represents interest, accruing at the rate of $17.48 per day, on the principal amount of $56,649.60, between the date on which the Bank disbursed the moneys and the date on which the Bank received reimbursement of the principal from SBA.

was purchased for $62,944. While no formal legal agreement was executed between SBA and the Bank, there is no dispute that the Bank furnished these funds based on SBA's agreement to reimburse the Bank for SBA's 90 percent share of the purchase price plus interest at a rate of $17.48 per day.

In June 1983, SBA paid the Bank the sum of $56,649.60, representing SBA's share of the purchase price (90 percent of $62,944).[2] However, in light of the Certifying Officer's doubt as to SBA's authority "to borrow funds from a bank and pay interest thereon," the accrued interest has not been paid pending a reply from this Office.

SBA's Office of General Counsel is of the opinion that the Bank's claim for accrued interest should be paid. In a memorandum dated July 29, 1983, the General Counsel summarized its position as follows:

> Section 5(b)(7) of the Small Business Act (15 USC 634(b)(7)) authorizes the Administrator to take any and all actions to liquidate or otherwise deal with or realize on loans made under the Act. Absent contrary statutory provisions, we believe section 5(b)(7) is broad enough to allow the Agency to borrow from this lender and to pay interest thereon.

The Certifying Officer's reluctance to accept the General Counsel's opinion is based on two factors. First, he is concerned that section 4(c)(5)(A) of the Small Business Act, 15 U.S.C. § 633(c)(5)(A) may stand in the way of SBA paying the accrued interest. This provision reads as follows:

> The Administration is authorized to make and issue notes to the Secretary of the Treasury for the purpose of obtaining funds necessary for discharging obligations under the revolving fund created by paragraph (1) of the subsection and for authorized expenditures out of the funds. * * * All borrowing authority contained herein shall be effective only to such extent or in such amounts as are provided in advance in appropriation acts.

The Certifying Officer maintains that under this provision, "SBA's 'borrowing authority' is restricted in the sense that the borrowing must be between SBA and the U.S. Treasury and then, only after Congress has approved the borrowing by way of appropriation acts." Second, the Certifying Officer argues that "borrowing from a bank is an unauthorized augmentation of appropriated funds," even though "the amount involved was available in the revolving fund and did not exceed authorized activity levels." We address the Certifying Officer's concerns in order.

Borrowing Authority Under 15 U.S.C. § 635(c)(5)

The language in 15 U.S.C. § 633(c)(5)(A) was enacted by Congress to enable SBA to borrow large sums of money from the Treasury, as needed, to fund the different loan programs operating out of SBA's two revolving funds. The explicit language of the statute, as

[2] SBA has informally advised us that its delay in repaying the principal amount, which obviously caused the total amount of accrued interest that is the subject of the present claim to increase, resulted from the inadvertent misfiling of the claim in SBA's Regional Office.

well as its legislative history clearly demonstrates that when Congress enacted the provision it was only concerned with SBA's authority to borrow from the Treasury.[3] *See* H. Conf. Rep. No. 96-1087, 96th Cong., 2d Sess. 39, 40 (1980). Accordingly, the provision has absolutely no applicability to a situation in which SBA obtains a short-term and relatively small advance of funds from a private bank with which SBA "shares" a joint interest in a guaranteed loan. This is especially true where, as here, the advance is needed to protect the common interests of SBA and the lender in preserving the collateral for the defaulted loan.

Augmentation

Similarly, we do not view the transaction as constituting an "unauthorized augmentation" since, as recognized in the submission, the amount advanced by the Bank did not exceed congressionally authorized spending levels for SBA and was subsequently repaid from the appropriate revolving fund, thereby reducing the total amount of money that could be used by SBA for program purposes. Thus, there was no improper increase or augmentation of the funds made available for SBA's loan programs by Congress.

Authority To Pay Interest

We agree with SBA's General Counsel that the authority granted the Administrator of SBA in 15 U.S.C. § 634(b)(7) to *"take any and all actions"* deemed necessary "in making, servicing, compromising, modifying, *liquidating, or otherwise dealing with or realizing on loans"* made under the Act, is sufficiently broad to encompass what SBA did in the case. [Italic supplied.] *See* B-140673, December 3, 1974. There is no dispute that the only reason SBA requested the Bank to advance these funds and agreed to repay 90 percent of the amount advanced to the Bank, plus accrued interest, was to protect SBA's security interest in the loan collateral that, in all likelihood, would otherwise have been lost. Given the specific circumstances that existed, there was a reasonable basis for SBA to exercise its broad statutory authority under this provision.

Moreover, while the Certifying Officer casts the issue in terms of SBA's authority to borrow from a private bank, we note that SBA's legal obligation to reimburse the Bank for the principal amount the Bank advanced—which SBA has already done—has not been raised as an issue in this case. The only question that is actually before us is SBA's authority to pay interest on the funds disbursed by the Bank to preserve the collateral on the defaulted loan. There is ample legal precedent to support SBA's authority to do so, in our view.

[3] This does not mean that we necessarily think that SBA otherwise has the inherent authority to "borrow" from private sources. As explained at greater length hereafter, we believe the relevant issue is the extent of SBA's authority to pay interest on a debt it incurs in connection with its efforts, as the agency administering this program, to maximize its recovery on a defaulted loan.

It has been the consistent position of our Office that, unless otherwise specifically prohibited, the Government may pay interest on an unpaid debt pursuant to a valid statutory or contractual provision that obligates it to do so. B-186494, July 22, 1976; B-184962, November 14, 1975. Moreover, we have held that even where there is no formal written contract between the parties, the Government is bound to pay late payment charges assessed against it by a utility company, which we viewed as analogous to interest charges. In B-173725, September 16, 1971, we advised a Forest Service Certifying Officer that since the Government had accepted the services of the utility company "with the understanding" that its obligation to pay for these services would be governed by the utility's published rate schedule which contained a late payment clause, the Government was legally bound to pay the late charges.

We note that in B-173725, September 16, 1971, we ruled that the Government was liable for the late charges even though it had not expressly agreed to pay such charges. In the case at hand, SBA did expressly agree to pay accrued interest to the Bank at a specified daily rate. Moreover; as stated above, we believe that SBA was authorized to enter into such an agreement pursuant to 15 U.S.C. § 634(b)(3).

While many of the cases in this area resulted from delays by the Government in making payment when due on contracts or other claims—a situation which is arguably distinguishable from the one at hand—we have on several occasions upheld the authority of an agency to pay interest that accrued on "borrowed" funds. B-154442, November 29, 1968; B-185016, July 8, 1976.[4]

Finally, there have been several prior instances in which our Office has upheld SBA's authority to make similar payments to banks or other lenders. For example, in B-149685, June 26, 1967, we held that SBA was authorized to pay interest on certain SBA guaranteed debentures which accrued as a result of SBA's "administrative delay" in promptly making payment when due under the terms of its guarantee. Although we expressed the view that SBA had no authority to engage in a general program of direct borrowing, we held that under the specific circumstances of that case, SBA's broad authority under 15 U.S.C. § 634(b)(7) and other statutory provisions was sufficient to authorize SBA to enter into the guarantee agreement and to pay the interest provided for thereunder.

Also, in a more recent case, 54 Comp. Gen. 219 (1974), we implicitly upheld SBA's authority to pay interest on moneys advanced by

[4] While these cases both involved situations in which a Government contractor or grantee requested reimbursement of the interest expense it incurred on funds it had borrowed from private lenders to complete performance of its Government contract or grant, we believe the principle is substantially the same where, as here, a bank charges interest on funds it advanced to the Government which were therefore no longer available to the bank to earn interest elsewhere.

a bank to further SBA's objectives, when the advance was made at SBA's request and with SBA's assurance that the amount advanced plus interest thereon would be repaid by SBA.

Accordingly, since SBA requested the Bank to advance these funds to protect their joint interest in the collateral and expressly agreed to pay interest thereon to the Bank, as it was authorized to do under the broad authority contained in 15 U.S.C. § 634(b)(7), SBA may pay the Bank's claim of $3,565.92 in accrued interest. However, our conclusion that SBA may pay this claim is based on the unique circumstances of this case. Thus, this decision is not intended to establish a broad legal precedent for future actions of this type and does not imply that we approve of SBA's actions in this case from a policy or procedural standpoint. In the latter respect, we are especially concerned about the informal, oral nature of the SBA commitment to the Bank.

[B-215282.2]

Bids—Responsiveness—Responsiveness *v.* Bidder Responsibility

Assertion that bidder cannot meet solicitation requirement of normally engaging in production of equipment to be purchased is different from general assertion that bidder is not capable of producing the item.

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Date Basis of Protest Made Known to Protester

Protest allegation raised more than 10 days after protester knew of basis for protest is untimely under General Accounting Office Bid Protest Procedures.

Matter of: Raymond Corporation, July 2, 1984:

The Raymond Corporation requests that we reopen our file on its protest against the award of a contract to Plymouth Locomotive under an invitation for bids issued by the Defense Logistics Agency.

Raymond originally filed its protest here on May 21, 1984. Its sole basis for protest was stated as follows:

We seriously doubt Plymouth's capability of producing an acceptable product and protest any award to Plymouth.

We dismissed the protest by decision of May 29 because "[w]hether Plymouth has the capability of producing an acceptable vehicle is a matter of responsibility" and we generally do not review challenges to affirmative determinations of responsibility. Raymond now states that the basis for its protest is that the invitation required bidders to be normally engaged in the production of the type of equipment being purchased and that to the best of its knowledge Plymouth is not so engaged.

What Raymond now alleges is different from what it alleged originally. Its initial protest challenged only Plymouth's general ca-

pability to perform the contract Raymond's more recent letter, however, suggests that the solicitation established a specific requirement that had to be met by the successful bidder and that Plymouth does not meet that requirement. These are different issues, and if indeed it was the latter issue that Raymond intended to raise, it should have done so at the outset. Raymond's first raising of this issue now, an entire month after it filed its original protest, is clearly untimely under our Bid Protest Procedures, which require protests such as this to be filed within 10 working days of when the basis for protest is known. *See* 4 CFR § 21.2(b)(2) (1984).

Accordingly, we will not consider Raymond's complaint.

[B-210706]

Courts—Judgments, Decrees, etc.—Payment—Permanent Indefinite Appropriation Availability—Civil Tax Cases

The permanent indefinite appropriation established by 31 U.S.C. 1304 is available to pay litigation cost awards made by Federal district courts and United States Claims Court under the authority of 26 U.S.C. 7430. The judgment appropriation is generally available for the payment of court awards unless payment is otherwise provided for, and there is nothing in the language or legislative history of 26 U.S.C. 7340 to make agency funds available to pay awards authorized by that section.

Courts—Judgments, Decrees, etc.—Payment—Appropriation Chargeable

Although 26 U.S.C. 7430 authorizes litigation cost awards by the United States Tax Court, no appropriation is currently available to satisfy such awards. The legislative history of 26 U.S.C. 7430 suggests that Congress did not intend that agency funds be used to pay such awards, and the permanent indefinite appropriation established by 31 U.S.C. 1304 is not available to pay the awards because section 1304 does not apply to the Tax Court.

Matters of: Source of funds for payment of awards under 26 U.S.C. 7430, July 5, 1984:

The Assistant Secretary for Administration of the Department of the Treasury has asked whether the permanent, indefinite judgment appropriation established by 31 U.S.C. § 1304 (formerly 31 U.S.C. § 724a) is available to satisfy litigation cost awards against the Internal Revenue Service (IRS) made under 26 U.S.C. § 7430 (I.R.C. § 7430). We hold that the judgment appropriation is the proper payment source of section 7430 awards made by the Federal district courts and the United States Claims Court, but not by the Tax Court. As explained below, no appropriation is currently available to satisfy section 7430 awards made in Tax Court cases.

Background

Prior to 1976, except for certain limited types of court costs authorized by 28 U.S.C. § 2412(a), there was no authority to award attorney fees or other litigation expenses against the United States in civil tax cases. In 1976, Congress authorized the courts to award

reasonable attorney fees to the prevailing party, other than the United States, in actions brought by or on behalf of the United States "to enforce, or charging a violation of, a provision of the United States Internal Revenue Code." 42 U.S.C. § 1988 (1976). Fee awards against the United States in tax cases authorized by 42 U.S.C. § 1988 were paid from the permanent judgment appropriation. B-158810, February 22, 1977.

In 1980, Congress enacted the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, title II, 94 Stat. 2325, extensively revising 28 U.S.C. § 2412 to authorize judicial awards of attorney fees in certain situations in which they were not previously authorized. Since it was intended that fee awards in civil tax cases be included under the new 28 U.S.C. § 2412(d),[1] EAJA § 205(c), 94 Stat. 2330, repealed that portion of 42 U.S.C. § 1988 authorizing awards in tax cases. However, the EAJA fee awards provisions were not viewed as applying to cases in the United States Tax Court.[2] Furthermore, awards under 28 U.S.C. § 2412(d) may not be paid from the permanent judgment appropriation, but must be paid from agency funds. 62 Comp. Gen. 692 (1983).

In 1982, Congress again dealt with fee awards in tax cases by enacting section 292 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248 (September 3, 1982), 96 Stat. 572. Section 292 added a new section 7430 to the Internal Revenue Code, which provides in general that courts in their discretion may award reasonable litigation costs to taxpayers who prevail in civil tax cases upon a showing that the position of the United States is unreasonable. I.R.C. § 7430(a), (c)(2). Litigation costs include court costs, expert witness fees, costs of studies and reports and attorney's fees. I.R.C. § 7430(c)(1)(A).

Aware that the EAJA does not apply to the Tax Court, Congress enacted section 7430 because it believed that taxpayers should be able to recover litigation costs in all tax cases, not just those heard in district courts and the Claims Court. It was concerned that since most tax litigation occurred in the Tax Court, relatively few taxpayers would be able to recover litigation costs without a legislative change. Further, the Congress believed that one set of rules should apply to awards of litigation costs in tax cases whether the action is brought in district court, the Claims Court or the Tax Court. H.R. Rep. No. 97-404, at 11 (1981). To further accomplish its objective of a uniform scheme for fee awards in tax cases, Congress made the new section 7430 the exclusive provision for such awards by amending 28 U.S.C. § 2412 to remove tax cases from the scope of the EAJA. Pub. L. No. 97-248, § 292(c), 96 Stat. 574.

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[1] S. Rep. No. 96-253, page 22 (1979); H.R. Rep. No. 96-1418, page 19 (1980).
[2] H.R. Rep. No. 97-404, page 10 (1981).

As do portions of the EAJA, the new I.R.C. § 7430 has a "sunset date," and without further congressional action, will not apply to proceedings commenced after December 31, 1985.

The permanent judgment appropriation is generally available to pay final judgments and compromise settlements against the United States in Federal district court cases and U.S. Claims Court cases and in certain other cases not relevant here, as long as "payment is not otherwise provided for." 31 U.S.C. § 1304(a)(1). Stated another way, if some appropriation or fund under the control of the agency involved in the litigation is legally available to satisfy a particular judgment or award, then the judgment appropriation is not available to pay it. The Assistant Secretary requested this decision because the Department is in doubt as to whether section 7430 authorizes the payment of awards from agency funds.

Availability of Agency Appropriations

The starting point is the long-standing rule that, except for certain situations not relevant here (for example, Government corporations and certain "sue and be sued" agencies), an agency's operating appropriations are not available to pay judgments unless provided for by statute. *E.g.*, 27 Comp. Dec. 262 (1920); 15 Comp. Gen. 933 (1936).

Under the Equal Access to Justice Act, agency appropriations are available to pay awards under 28 U.S.C. § 2412(b) if based on a finding that the United States acted in bad faith, and awards under 28 U.S.C. § 2412(d). 62 Comp. Gen. 692 (1983); B-40342.3, March 19, 1984, 63 Comp. Gen. 260. However, the payment provisions of the Equal Access to Justice Act were not carried forward into the new section 7430. We have found nothing in the language or legislative history of section 7430 to make the operating appropriations of the IRS available to pay the awards in question.

Moreover, we note that at least four unenacted bills very similar to section 7430 which Congress had before it at the time it was considering section 7430 contained an express provision that agency funds should be used to pay "litigation cost" awards. S. 752, 97th Cong., 1st Sess. § 2 (1981); S. 1673, 97th Cong., 1st Sess. § 2 (1981); S. 1673, 97th Cong., 1st Sess. § 2 (1981); H.R. 3262, 97th Cong., 1st Sess. § 2 (1981); H.R. 4857, 97th Cong., 1st Sess. § 2 (1981). Each of these bills would also have created a new section 7430, and each included an additional subparagraph (g) which reads as follows:

> (g) Source of Payment.—Payment of any award for reasonable court costs under subsection (a) shall be made by the agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose.

This payment provision was not included in the enacted version of section 7430. Since we could find no mention of the reasons for deleting it, its effect in terms of legislative intent must be viewed as inconclusive. Nevertheless, it is of some relevance that if Congress

had wished to expose IRS operating appropriations, it had language before it to accomplish that purpose.

Availability of the Permanent Judgment Appropriation

The permanent judgment appropriation, 31 U.S.C. § 1304, provides in pertinent part as follows:

> (a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—
>
> (1) payment is not otherwise provided for;
> (2) payment is certified by the Comptroller General; and
> (3) the judgment, award, or settlement is payable—
>
> (A) under section 2414, 2517, 2672, or 2677 of title 28;
> (B) under section 3723 of this title;
> (C) under a decision of a board of contract appeals; or
> (D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 203 of the National Aeronautics and Space Act of 1958 (42 U.S.C. § 2473).

The statute specifically enumerates the items for which it is available. Judgments by United States district courts are expressly included (28 U.S.C. § 2414), as are judgments by the United States Claims Court (28 U.S.C. § 2517). Thus, since we have determined that they are not otherwise provided for, awards under section 7430 made by a district court or by the Claims Court may, upon becoming final, be certified for payment from the judgment appropriation. B–158810, February 22, 1977.

However, 31 U.S.C. § 1304 nowhere mentions the Tax Court, and has in fact never been available for Tax Court proceedings. Thus, the judgment appropriation by its terms does not apply to Tax Court awards, and therefore may not be used for their payment unless made available by some other statute. Again, we have reviewed the language and legislative history of TEFRA and find no mention of the actual payment of Tax Court awards.

An appropriation of funds from the Treasury cannot be inferred. It must be explicitly stated. This is required by 31 U.S.C. § 1301(d) (formerly 31 U.S.C. § 627), which provides that a statute may be construed as making an appropriation only if it expressly so states. While the statute does not necessarily have to be in the form of a traditional "appropriation act," it must nevertheless be specific. B–114808, August 7, 1979. Therefore, since TEFRA merely authorizes the making of the awards and does not made provision for their payment, and since there has been no corresponding amendment to 31 U.S.C. § 1304, we must conclude that TEFRA does not independently appropriate funds for payment of the awards, nor does it make the permanent judgment appropriation available for their payment.

Conclusions

In view of the foregoing, operating appropriations of the IRS currently are not available to pay "litigation cost" awards made under

the authority of 26 U.S.C. § 7430. Such awards, if made by United States district court or the United States Claims Court may be certified for payment from the permanent judgment appropriation (31 U.S.C. § 1304). However, the judgment appropriation is not available to pay "section 7430 awards" made by the United States Tax Court.

Although the Congress has authorized the payment of litigation costs in Tax Court cases by enacting section 7430, as yet no funds have been appropriated for this purpose. Accordingly, to perfect the section's purpose we recommend that the IRS request specific congressional appropriations to cover the litigation costs awards which the Tax Court has made against it since section 7430 was enacted. In the alternative, we note that Congress could amend section 7430 so as to make the permanent judgment appropriation available by adding a new subsection, subsection "(g)" which could provide:

Awards for reasonable litigation costs under subsection (a) made by the Tax Court shall be paid from the appropriation made under section 1304 of title 31.

Under this alternative approach the source of funds for the payment of Tax Court awards would be the same as for district court and United States Claims Court awards.

[B-214089]

Officers and Employees—Transfers—Real Estate Expenses—Taxes—Sales Tax on Mobile Home, etc.

If sellers of mobile homes customarily collect from purchasers a state sales or "gross receipts" tax, the employee may be reimbursed the tax he paid for a mobile home at his new duty station, even though sellers are not required under state law to shift the tax to purchasers by collecting it from them. Overrules 54 Comp. Gen. 93 (1974).

Officers and Employees—Transfers—Real Estate Expenses—Broker's Fees—Legal Obligation to Pay Requirement

An employee may not be reimbursed a fee or commission paid in connection with the sale of his home at his old duty station to an agent who was not a licensed realtor and acted as a caretaker. Fees for caretaker services are not reimbursable nor are fees paid to individuals who are not licensed and under state law cannot legally receive a realty commission or fee.

Matter of: Irvin W. Wefenstette, July 5, 1984:

Mr. Irvin W. Wefenstette, an employee of the Department of Labor, incurred a state sales or "gross receipts" tax when he purchased a moble home at his new duty station. Although under state law sellers are not required to collect the tax from purchasers, the tax may be reimbursed if it is customarily collected from purchasers in the locality of the sale. However, Mr. Wefenstette may not be reimbursed the amount he paid to an individual who was not a

licensed realtor in connection with the sale of his home at his old duty station.[1]

Mr. Wefenstette incurred the expenses in connection with his transfer from Venita, Oklahoma, to Paintsville, Kentucky, in November 1982. The Government reimburses the employee relocation expenses only if the entitlement provisions of the applicable law, 5 U.S.C. § 5724a, and regulations, Federal Travel Regulations, Chapter 2 (September 1981 as amended), *incorp. by ref.,* 41 CFR § 101-7.003 are satisfied.

Tax on Mobile Home

Mr. Wefenstette purchased his mobile home at Paintsville, Kentucky, his new duty station. The claim file includes a copy of a bill for its purchase at a price of $22,510 to which was added a "sales tax" of $1,125. He made a deposit of $2,000 and paid the balance upon delivery on December 17, 1982.

The employing office declined to reimburse the tax on the mobile home because Mr. Wefensette had not submitted a copy of the state tax code, the sales receipt showing the amount the tax paid, and a claim form prescribed by the agency. Although the agency reasons for disallowing payment appear technical, state tax code and other information regarding this claim and the amount paid are relevant, since to be reimbursable the tax must be paid by the employee as a "mortgage or transfer tax." See FTR, paragraph 2-6.2d. *Howard B. G. Kittredge,* B-190484, February 14, 1978.

In the cited case we held that a general sales tax on the purchase of a mobile home was a reimbursable transfer tax since under the state tax code involved, as construed by state courts, the ultimate burden of the tax fell on the purchaser. The tax applied to the sales transaction rather than the property itself and was therefore an excise tax on the sales transaction and not a property tax. Further, in order for the purchaser to receive legal title the tax had to be paid. We have reached the same result when the state tax code expressly required the seller to collect the tax from the purchaser. *Gerald M. Houts,* B-189377, February 13, 1978. *Clyde W. Myers,* B-187056, November 24, 1976.

But in some states the tax is not always collected from buyers. Retailers must pay a tax measured by a percentage of gross receipts from their business rather than receipts from each separate sales transaction. They may, but are not required to, add the tax amount as a separate item on their customer billings, thereby shifting the tax to the customer. We held that under such a provision in the New Mexico tax code, applicable to the sale of real estate, the reimbursement could not be allowed, because the tax was im-

[1] Mr. Bert Bernard, Authorized Certifying Officer, Department of Labor, requested this decision.

posed on the seller not on the employee who was the buyer. 54 Comp. Gen. 93 (1974).

The decision in that case was predicated upon a rule that we would look to the state tax laws as interpreted by the courts and not to the impact of the tax on the employee. Thus, we held that a tax which was imposed upon the seller of a mobile home and not on the employee who, as the buyer, could not be reimbursed under the applicable law and regulation even though the tax under local law could be passed on to the buyer and in fact was passed on to the buyer under local practice. Upon reevaluation of the cases involving reimbursement of "sales taxes" we find that the rule adopted in 54 Comp. Gen. 93, *supra,* is unnecessarily restrictive in that it would deny reimbursement of a tax because of the technical wording of state law, even though the ultimate burden of the tax may be, and by local custom, is passed on specifically to the employee who is the buyer of the residence or mobile home.

Therefore, even though a local sales tax is by law imposed upon the seller as a "gross receipt" or similar tax, if this tax may be passed on to the buyer as a specific item for payment, the employee may be reimbursed the tax paid if it is the custom in the area in which the purchase was made to add the tax as a specific item to the purchase price. The decision at 54 Comp. Gen. 93, *supra,* is overruled. .

Regarding "sales tax" in Kentucky, a tax is imposed on retailers based upon their gross receipts. Ky. Rev. Stat. Ann. § 139.200 (Baldwin 1983). However, the code specifically provides that the tax may be collected from the consumer. Ky. Rev. Stat. Ann. § 139.210 (Baldwin 1983). Further, in order to register a mobile home the owner must demonstrate that the state tax has been paid. Ky. Rev. Stat. Ann. § 186.655(5) (Baldwin 1983). Since the Kentucky sales tax is imposed on the retailer but may be passed on to the consumer, under the rule adopted herein, the agency must determine whether the tax is customarily passed on to the consumer in the local area in which the sale was made.

The custom should be determined by the employing agency after consulting with the local or area office of the Department of Housing and Urban Development. See paragraph 2-6.3c of the FTR; *Matter of Real Estate Expenses,* 54 Comp. Gen. 827 (1975).

If the employing office determines that the local custom in the vicinity of Paintsville is for the buyer to pay the Kentucky gross receipts tax equal to 5 percent of the purchase price, Mr. Wefenstette is entitled to reimbursement of the tax payment. He should, of course, perfect his claim by preparing and submitting the proper form to his employing office and by furnishing the original sales document or other appropriate evidence that he has in fact paid the tax in question.

Real Estate Commission

Mr. Wefenstette paid a fee for the sale of his home in Chelsea, Oklahoma, near his old duty station at Venita. The person to whom the fee was paid was not a licensed real estate broker. Mr. Wefenstette submitted a receipt showing his payment of a $1,000 selling fee, a $15 newspaper advertisement, and a $10 typing expense for preparing the sales contract. The agency disallowed the selling fee but allowed reimbursement of the advertising and typing costs.

Mr. Wefenstette explained that he had obtained the services of an unlicensed person because each of the two licensed realtors in Chelsea or their husbands operated coal mines he had inspected in the performance of his official duties. Further, since he made the final arrangements for the sale, the person to whom he paid the fee acted as a caretaker of the residence to answer phone calls and open the home for inspection. He does not regard the commission or fee to have been for the services of a real estate broker.

A broker's fee or real estate commission is expressly authorized under paragraph 2-6.2a of the FTR. However, reimbursement is denied for amounts paid to an individual who is not a licensed realtor if the absence of a license makes the fee or commission unlawful and not a legally enforceable debt. See *W. Jerry Goudelocke,* B-189375, October 12, 1977. *Mathew Biondich,* B-197893, June 4, 1980.

The residence sale at the old duty station in this case was subject to regulation by Oklahoma law. Under it, no person except a licensed "real estate broker" or "real estate sales associate" may in exchange for a commission or fee sell, offer to sell or list real estate or negotiate such activity. A "real estate sales associate" is a person who performs such activity as an employee or independent contractor of a "real estate broker." 59 Oklahoma Statutes Annotated §§ 858-102 and 301. Unless licensed, a party may not bring a court action to obtain compensation for acting as a real estate broker or real estate sales associate. 59 Oklahoma Statutes Annotated § 858-311. Further, violation of these provisions is a misdemeanor. 59 Oklahoma Statutes Annotated §§ 858-401.

However, Mr. Wefenstette says that he paid for services of a caretaker. He indicates that he handled the sale himself and employed no broker or associate. The fee was paid for services rendered by the individual acting as caretaker, answering the telephone and unlocking the house, for viewings by interested parties. Even if the fees were paid for caretaker type services and not for selling the house, reimbursement would not be allowed since such a fee is considered to be for maintenance of the property which is specifically not a reimbursable item. FTR para. 2-6.2d; *Leland D. Pemberton,* B-200167, July 7, 1981.

Consequently, Mr. Wefenstette is not entitled to reimbursement of the $1,000 fee he paid in connection with the sale of his residence.

[B-215607]

Contracts—Small Business Concerns—Awards—Small Business Administration's Authority—Size Determination

Protest concerning the small business size status of offeror is by law a matter for decision by the Small Business Administration and not for consideration by General Accounting Office (GAO).

Contracts—Small Business Concerns—Awards—Review By GAO—Authority to Withhold Award

Since GAO has no authority to order withholding of award pending determination of offeror's small business size status by Small Business Administration, protest requesting such relief is dismissed.

Matter of: Biospherics Incorporated, July 9, 1984:

Biospherics Incorporated (Biospherics) protests the proposed award of contract to Sorenson Development Incorporated (SDI) under request for proposals (RFP) No. 200-84-2708(P), issued by the National Institute for Occupational Safety and Health (NIOSH). The RFP was issued as a 100-percent small business set-aside. The protester contends that SDI is affiliated with a large business concern and, thus, is ineligible for the award. Biospherics has protested SDI's size status to the Small Business Administration (SBA).

The protester expresses concern that due to "internal pressure," NIOSH may award the contract to SDI regardless of its eligibility, before the SBA makes a size determination. Biospherics argues that we should ensure that SDI's eligibility is carefully reviewed and that no award is made until the review is completed.

Under 15 U.S.C. § 637(b)(6) (1982), the SBA has conclusive authority to determine matters of small business size status for Federal procurement purposes. Therefore, our Office does not consider size status protests. 4 C.F.R. § 21.3(g)(2) (1983).

Furthermore, the General Accounting Office has no authority to order the withholding of an award. *Hoffman-Whitehead Co.,* B-208472, Aug. 30, 1982, 82-2 C.P.D. ¶ 186; *Dauphine Corporation,* B-202665, Apr. 14, 1981, 81-1 C.P.D. ¶ 284. We note that under the Federal Acquisition Regulation (FAR), § 19.302(h)(i), 48 Fed. Reg. 41,102, 42,246 (1983) to be codified at 48 C.F.R. § 19.302(h)(i), where the contracting officer is timely notified of a size status protest prior to award, the contracting officer shall not award the contract until the SBA has made a size determination or 10 business days have expired since SBA's receipt of a protest, whichever occurs first. In any event, the FAR states that award shall not be withheld when the contracting officer determines in writing that an award must be made to protect the public interest.

We dismiss the protest.

[B-214473]

Property—Private—Damage, Loss, etc.—More Than One Custodian—Presumption

Damage in transit to goods passing through the hands of successive custodians is not presumed to occur in the custody of the last custodian where that custodian notes that preexising damage exists on receipt of the goods.

Property—Private—Damage, Loss, etc.—Carrier's Liability—*Prima Facie* Case

In order to hold a common carrier liable for damage in transit, the shipper bears the initial burden of establishing a *prima facie* case of liability by showing that the goods transported were in better conditions when received by the carrier at origin than when delivered by the carrier at destination.

Property—Private—Damage, Loss, etc.—Household Effects—Liability Determination

Where the record shows the existence of preexisting damage and lacks evidence of greater or different damage, the common carrier has not been shown to be liable for damage in transit.

Property—Private—Damage, Loss, etc.—Carrier's Liability—Preexisting Damage

In the absence of a special contract or statute, a common carrier is not liable for preexisting damage to goods occurring in the custody of a prior custodian of the goods.

Matter of: Continental Van Lines, Inc., July 10, 1984:

Continental Van Lines, Inc. (Continental), requests review of the disallowance by our Claims Group, General Government Division, of its claim for refund of $35 recovered by the Department of the Navy (Navy) for damage in transit to the dining room table of Captain William E. Dennison, USN, while being transported from nontemporary storage in Tacoma, Washington, to Lemoore, California, under Government bill of lading No. AP-539,745.

We allow the claim.

Continental picked up the shipment from nontemporary storage at Metropolitan Movers in Tacoma, Washington. On pickup, Continental prepared a manifest on which was noted that the top of the dining room table was scratched and marred. On delivery at destination, the owner, Captain Dennison, noted damage to the table consisting of the top of the table "chipped." The Navy Schedule of Property describes the damage at destination as "Top Scraped." The Navy Inspection Report, DD 1841, described the damage as "Top Gouged." The Navy also reported that the repairman indicated that the damage involved removal of a bit of wood, but was not deep enough to repair as a gouge and was recent damage.

For this damage, the Navy claimed from Continental the repair costs of $35 and, on denial by Continental, that amount was recov-

ered by setoff. Continental claimed refund of the amount set off on the grounds that the damage was noted on pickup of the shipment as preexisting damage. Our Claims Group denied the claim on the grounds that the preexisting damage was a scratch while the damage noted at destination consisted of a scrape, citing the decision in *Julius Klugman's Sons, Inc.* v. *Oceanic Steam Nav. Co., et al.,* 42 F.2d. 461 (1930), which held that damage to goods which pass through the hands of several custodians is presumed at common law to occur in the custody of the last custodian.

In the decision cited by the Claims Group, the court held, among other things, that where goods pass through the hands of successive custodians, in apparent good order, any loss is presumed to have occurred while they were under the control of the last custodian. This record shows, however, that the dining room table did not pass into the custody of Continental in apparent good order. On receipt by Continental, Continental noted a scratch and a mar on the top of the table. The cited decision is not applicable.

In order to hold a common carrier liable for damage in transit, the shipper bears the initial burden of establishing a *prima facie* case of liability by showing that the goods transported were in better condition when received by the carrier at origin than when delivered by the carrier at destination. *Missouri Pacific R. Co.* v. *Elmore & Stahl,* 377 U.S. 134 (1964).

The evidence in this record shows that the dining room table bore damage, when received by Continental, consisting of a scratched and marred top and, on delivery at destination, bore damage variously described as "chipped," "scraped," and "gouged on top." None of the terms are defined, except to the extent that the Navy stated that "according to Webster, a 'rub,' 'scratch,' and 'scrape' are technically the same." On this record, the evidence does not establish that additional damage occurred to the table while in the custody of Continental. A common carrier is not liable for preexisting damage, in the absence of a special contract or statute. 14 Am. Jur. 2d., Carriers § 684; 13 C.J.S., Carriers § 424b(1), and there is no evidence of special contract or applicable statutory provision.

The claim is allowed.

[B-213734]

Contracts—Protests—Contract Administration—Not For Resolution by GAO

Protest against contracting agency's determination to permit a contractor to cure a contract breach is dismissed since the issue involves contract administration, which is the agency's responsibility, not General Accounting Office's.

Contracts—Offer and Acceptance—Acceptance—What Constitutes Acceptance

A contract comes into existence when an offer is accepted by the Government, not when it is submitted. Further, in either sale or procurement, the acceptance must be clear and unequivocable.

Matter of: Kodiak Timber, Inc., July 17, 1984:

Kodiak Timber, Inc. protests the Forest Service's sale of timber in the Fremont National Forest, located in Klamath County, Oregon, to Modoc Lumber Company under contract No. 063026. The protester argues that Modoc, the highest bidder, breached its contract by failing to deliver a required 5 percent cash deposit within 30 days after notice of the award. Kodiak also alleges that the Forest Service actually accepted its own subsequent offer to meet the highest bid price, thereby resulting in a contract with Kodiak for the same timber.

We dismiss the protest in part and deny it in part.

The solicitation required, in addition to a bid guarantee, a cash deposit (or the provision of effective purchaser credit) equal to 5 percent of the total bid. This amount was to be forwarded within 30 days of notice of bid acceptance. Failure to make the cash deposit would, according to the solicitation, result in a breach of contract, and the Government would retain the bid guarantee as liquidated damages.

Modoc received notification of award on August 5, 1983, so that the 5 percent cash deposit was due no later than September 6. (Modoc's bid guarantee of $39,900 was applied to the $55,100 cash deposit, leaving $15,200 due.) Modoc failed to provide the deposit balance on time, but attempted to forward payment on the morning of September 7. The Forest Service, however, retained Modoc's $39,900 bid guarantee; returned the $15,200 check Modoc had sent; informed Modoc that the failure to furnish the deposit within the specified time had resulted in a breach of contract; and advised that the sale would be offered at the highest price bid to the remaining qualified bidders in the order of their bids. In this respect, Forest Service regulations, 36 C.F.R. § 223.5(g) (1983), provide that:

> Forest Officers may sell, within their authorization, without further advertisement, at not less than the appraised value * * * *any timber on uncut areas included in a contract which has been terminated by abandonment, cancellation, contract period expiration, or otherwise* if such timber would have been cut under the contract * * *. [Italic supplied.]

The Forest Service then notified other bidders of the reoffering, and Kodiak, the next highest bidder, returned a bid.

Modoc subsequently challenged the Forest Service's actions, noting that the Modoc-Forest Service contract expressly required the Forest Service to allow the purchaser 30 days to remedy a breach of contract. Modoc therefore forwarded a cashier's check for $55,605.10; $55,100 constituted the initial 5 percent cash deposit and $505.10 was for interest calculated at 11 percent per year. The

firm proposed that the Forest Service also keep the bid guarantee as liquidated damages. The Director of the Timber Management Branch of the Forest Service agreed with Modoc's position, and the contracting officer therefore returned Kodiak's sealed bid unopened, informing it that the award of the sale to Modoc had been consummated.

Kodiak contends that by its breach of contract, Modoc terminated its contractual relationship with the Forest Service.

We dismiss this complaint.

The contract, which came into existence when the Forest Service accepted Modoc's bid, expressly provides for a 30-day remedy period for breach, with the retention of any bid deposit by the Government as liquidated damages. A contractor's compliance with its contractual obligations is a matter for the procuring agency in the administration of the contract, not our Office. *Fancy Industries, Inc.,* B-209156, Nov. 8, 1982, 82-2 CPD ¶ 415. We have no basis to object to the Forest Service's allowing Modoc to cure its failure to furnish a timely cash deposit.

Kodiak also contends that as next highest bidder, its forwarding of a bid and bid deposit at the Forest Service's invitation resulted in an automatic award.

We deny the protest on this issue.

It is fundamental that a firm's offer to contract with the Government is just that—an offer—and that the act necessary to establish a contractual relationship thus is not the submission of a bid, but the Government's acceptance of that bid. Further, the acceptance must be clear and unequivocable, regardless of whether the resulting contract is for the sale of timber, 49 Comp. Gen. 431 (1970), or the procurement of goods or services. *Northpoint Investors,* B-209816, May 17, 1983, 83-1 CPD ¶ 523.

Here, as the Forest Service points out in its report on Kodiak's protest, the sale solicitation stated that "a written award mailed (or otherwise furnished) to the successful bidder shall be deemed to result in a bidding contract." No such notice was furnished to Kodiak. Finally, the invitation to Kodiak and other firms to match Modoc's offer was accompanied by an explicit reservation by the Forest Service of its right to reject any and all bids.

The protest is dismissed in part and denied in part.

[B-214079]

Bids—Late—Telegraphic Modifications—Mishandling by Government

The protester's late telegraphic modification was sent in accordance with the request for proposals (RFP) instructions concerning the transmission of telegraphic messages and received at the procuring agency's message center more than 2½ hours prior to closing. The modification should be considered because the lateness was caused by the procuring activity's faulty RFP instructions.

Matter of: Space Ordinance Systems, a Division of TransTechnology Corporation, July 18, 1984:

Space Ordinance Systems, a Division of TransTechnology Corporation (SOS), protests the rejection of its telegraphic bid modification as late under request for proposals (RFP) No. DAAA09-83-R-4606, issued by the United States Armament, Munitions and Chemical Command (AMCCOM), Rock Island, Illinois. We sustain the protest.

The RFP was issued for the M206 infrared flare with November 15, 1983, 3:45 p.m., set as the closing date for the receipt of initial proposals. The following instructions were set out in the RFP with respect to telegraphic modifications:

> Prompt handling of telegraphic solicitation modifications/withdrawals depends upon proper identification. It is, therefore, very important that the message be identified as follows: This message is for Claudia Applegate. Call 309-794-3700 upon receipt. This is a modification/withdrawal of [RFP-4606]. Telegraphic messages transmitted other than [by] the TWX system will probably not be received in a timely manner under current conditions.

On November 15, SOS modified its original proposal. SOS's modification was worded as follows:

> AMCCOM
>
> Rock Island, Ill.
>
> ATTN: Mrs. Claudia Applegate
>
> This message is for Claudia Applegate. Call Claudia Applegate upon receipt of this message at 794-3700. This is a modification of RFP-4606. [There followed the modified prices.]

The modification was received at 1:08 p.m., that same day, by the AMCCOM Communications Center, which is located three floors below the room designated for receipt of proposals. But the modification was not received in the designated room until 2 days later. The contracting officer determined that the late modification could not be considered because the late receipt was not due solely to Government mishandling after receipt at the Government installation. If SOS's modification had been accepted, it would have offered the lowest price. Awards, however, were made on December 29, 1983, to the next two lowest bidders. First article approval was due 5 months after award.

SOS argues that AMCCOM mishandled the modification because the modification was received at the AMCCOM message center 2½ hours before the closing time, but it was not timely delivered.

In response, AMCCOM argues that if the message had been marked in some way to indicate its urgency—for example, by noting the closing date and time of the RFP—the message would have been timely delivered. Finally, AMCCOM advises that even if SOS's modification had been considered, SOS would not have received an award because the contracting officer would have determined the company to be nonresponsible.

In determining whether there has been mishandling at the Government installation, our Office will examine the procedures adopted for the receipt and further transmittal of messages to determine whether the means of receipt and transmittal are calculated to effect delivery within a reasonable time. See *Stack-On Products Company, Ontarioville Metal Products,* B-181862, Oct. 22, 1974, 74-2 C.P.D. ¶ 220. We also recognize that at installations which receive voluminous numbers of telegraphic communications daily, it may be necessary to handle telegrams which are not marked urgent in a standardized manner and, in such circumstances, immediate transmission of the communications to the proper office may not be feasible; on the other hand, where a telegram is marked "Rush" and the volume of telegraphic communications handled by the Government installation is not excessive, the delivery of a telegraphic bid modification via routine mail constitutes mishandling *per se* on the part of the Government. See *SRM Manufacturing Company,* B-199141, Dec. 16, 1980, 80-2 C.P.D. ¶ 434.

AMCCOM contends that considering the volume of messages handled by the message center every day—which AMCCOM reports averages 600 to 700 messages per day—it cannot reasonably be expected that every message can be treated expeditiously unless the message is marked "urgent." Nevertheless, SOS wired its modification to the proper place in accordance with the instructions provided in the RFP.

In our opinion, SOS's message, which stated "Call Claudia Applegate upon receipt of this message," was sufficient to suggest the urgency of the message without using the specific word "urgent." If the directions in SOS's modification had been carried out (namely, the phoning of Claudia Applegate, the contract specialist for RFP-4606), the modification would have been timely delivered, since, as contract specialist, she was aware of the RFP deadline.

But the phone call was never made by the message center, apparently because of the way SOS organized its message. As shown above, SOS's message contained only Claudia Applegate's name in the heading of the message on the "attention line." The line conveying the urgency of the message—"Call Claudia Applegate upon receipt of this message at 794-3700. This is a modification of RFP-4606" appeared in the body of the message following—after double spacing—the attention line of the message. Given the volume of messages, the communications center personnel apparently scanned only the heading of SOS's message (from the top line of the TWX down to, and including, the attention line) and not the body of that message.

While the RFP instructed offerors to "identify" their modifications as shown above, offerors were not specifically told that the full "urgency" message should be in the *heading* (meaning the "attention" line or above) of the message as, we think, they should

have been, given the message center's apparent practice of scanning only the headings of messages.

Given these circumstances, it is our view that AMCCOM was ultimately responsible for the late receipt of SOS's modification. Therefore, we recommend that in the future, AMCCOM should specifically advise offerors to place the urgency of the message (phone upon receipt) in the heading of the message.

The appropriate corrective action in this case is to evaluate SOS's modification—thereby making SOS the low offeror—and to evaluate the present responsibility of SOS notwithstanding that the contracting officer states that at the time of award, SOS would have been determined to be nonresponsible. A responsibility determination should be based on the most current information available to the contracting officer at the time the determination is made. See *Beacon Winch Company—Request for Reconsideration*, B-204787.2, Aug. 15, 1983, 83-2 C.P.D. ¶ 205. In the event that SOS is determined to be responsible, we recommend that AMCCOM consider the feasibility of terminating the current contracts for the convenience of the Government and awarding to SOS for the remaining requirement.

The protest is sustained.

[B-212712]

Bids—Responsiveness—Insurance Coverage

Bid on solicitation for insurance coverage was responsive even though awardee's fire insurance policy provided for loss payment only after the property is repaired or replaced, since the solicitation language which the protester claims the awardee's policy violated pertained only to the time of setting the value of the damage or destroyed property, not to the time of payment of any fire loss or damage claims.

Bids—Construction—Inconsistent Provisions

General Accounting Office (GAO) finds that it was reasonable for the agency to conclude, after applying general principles of insurance law, that the awardee's typed indorsement to its fire insurance policy, which complied with the solicitation, took precedence over a printed portion of the same policy which did not comply.

Bids—Responsiveness—Training Plan

Awardee properly complied with the solicitation requirement that the bidders attach to their bids a proposed education program to prevent fire loss and that the cost of the proposed training program be included in the bid price. GAO concludes that language in awardee's bid which also offered assistance in obtaining for the agency certain training kits from the National Fire Protection Association at the agency's expense was merely informational and did not qualify the awardee's bid.

Bidders—Responsibility *v.* Bid Responsiveness—Designated Method of Performance Requirement

General Accounting Office finds that solicitation requirement for the bidder providing a statement of how a preference in training and employment of Indians would be carried out related to the bidders' responsibility and need not have been completed prior to bid opening.

Matter of: Corroon & Black/Dawson & Co., Inc., July 20, 1984:

Corroon & Black/Dawson & Co., Inc. (Corroon), protests the award of a contract to Alexander & Alexander of Texas, Inc. (Alexander), under an invitation for bids (IFB) issued by the Department of Housing and Urban Development (HUD) pursuant to that agency's Indian Housing Master Insurance Program. The IFB was for insurance for Indian Housing Authorities for fire, automobile, and fidelity bond coverage under a single master policy. Corroon contends that Alexander's bid failed to comply with several of the IFB's material provisions and was nonresponsive.

For the reasons set forth below, we deny Corroon's protest.

Eight bids were received by HUD under the IFB. Alexander's bid of $9,966,564 was determined to be the lowest, responsive bid. Corroon's bid of $10,026,916 was the second lowest, responsive bid.

Fire Insurance Coverage

Corroon contends that the replacement cost coverage in the fire and extended coverage insurance policy Alexander submitted with its bid imposed an improper modification on the requirement in the IFB that the insurer pay full replacement cost at the time of loss and the bid is, therefore, nonresponsive. Corroon further claims that the effect of Alexander's limitation is enormous because the Indian Housing Authorities itself must finance the repair or replacement of damaged property until payment under Alexander's policy is made.

HUD argues that Corroon's argument is based upon an inaccurate characterization of the IFB provision dealing with the valuation method of the insured property that is damaged or destroyed. We agree. Paragraph 3 of the IFB stated:

FIRE AND EXTENDED COVERAGE AMOUNT. The coverage is to be provided on the basis of full replacement at the time of loss.

We find that HUD is correct in stating that the above-quoted IFB provision deals with setting the value of damaged or destroyed property at the time the damage or destruction actually occurs, while the questioned language in Alexander's policy deals instead with the time of payment of any fire loss or damage claim.

The IFB was silent with respect to when payment for damage or loss was to be made. Therefore, since the IFB clause was directed at the measure of damages, rather than when payment of those damages was to be made, we find that Alexander did not take any exception to the IFB by submitting a policy with its bid that contained a provision specifying the time any loss or damage claim would be paid. Therefore, the bid was responsive.

Coverage of Vacant Property

Corroon asserts that Alexander's fire insurance policy does not comply with the requirements of the IFB concerning insurance coverage of vacant or unoccupied property. More specifically, Corroon argues that Alexander's policy improperly limits loss payment by 15 percent for buildings that are unoccupied beyond a period of 60 consecutive days. Corroon points out that the IFB requires the bidders to allow insured property to remain vacant or unoccupied without any "limit of time." Consequently, Corroon takes the position that Alexander's 15-percent reduction in loss payment after 60 days of nonoccupancy was a qualification to the IFB's vacancy clause.

HUD states that Corroon has overlooked the effect of a typed endorsement attached to Alexander's bid which provided a vacancy clause identical to the IFB's. HUD further states that under principles of insurance law, a typed portion of an insurance contract is interpreted as a more deliberate expression of the intent of the parties than a printed portion such as the one which Corroon contends violates the IFB's vacancy clause. *See* 43 Am. Jur. 2d, Insurance §§ 279 and 280. Corroon offers no fact or argument to refute HUD.

We find that while there is a conflict between the typed endorsement to Alexander's policy which complies with the IFB's vacancy clause requirements and the printed policy language which does not comply, it was reasonable for HUD to conclude that it was the intent of Alexander in its bid to comply with the IFB requirements concerning loss payment for fire damages to vacant buildings. An essential element of a valid bid is that it be sufficiently certain in terms of what it offers in order to enable the contracting agency to accept it with confidence that an enforceable contract meeting all the solicitation requirements will result. *Interface Flooring Systems, Inc.*, B-206399; B-207258, Apr. 22, 1983, 83-1 C.P.D. ¶ 432. Here, HUD, through the application of general principles of insurance law, assured itself that Alexander's bid on its face complied with the requirements of the IFB's vacancy clause.

Cost of Training Materials

Corroon charges that Alexander's bid improperly charged extra costs for training materials which were over and above the total premiums for the various types of insurance required by the IFB. Corroon emphasizes that the IFB provided that award would be based on the lowest total projected premiums charged. According to Corroon, this means that all costs to the Indian Housing Authorities were to be included in the premium prices bid by the bidders and that there would be no additional costs besides the premiums. Corroon alleges that Alexander stated, however, that certain training materials for prevention of property loss could be requested by the Indian Housing Authorities at its expense. In Corroon's opin-

ion, Alexander's attempt to impose these "extra costs" should have resulted in the rejection of the company's bid as being nonresponsive.

We find Corroon's arguments to be unconvincing. The IFB required only that the bidders attach to their bids a description of their education program to prevent fire loss. The IFB did not detail, however, any particular type of training program for loss prevention. The record shows that Alexander submitted a loss prevention program with its bid which consisted of engineers experienced in fire protection providing training sessions for selected individuals from the various Indian Housing Authorities. The record further shows that the cost of these training sessions was included in the premium price that Alexander bid. Therefore, it is clear that Alexander did submit some type of loss prevention program with its bid as required by the IFB and that the cost of this program was made part of the company's overall bid price.

With regard to Alexander's offer of training supplies, the record shows that Alexander referenced in its bid certain educational training kits and posters available from the National Fire Protection Association. Alexander further indicated that it would gladly have the association furnish prices for the kits and posters upon request. We find that these statements by Alexander were merely informational and, therefore, did not evidence any intent by the company to qualify its bid. In our view, Alexander was calling attention to the fact that certain fire prevention training materials were available from the National Fire Protection Association and that Alexander would act as a go-between for the Indian Housing Authorities if these materials were wanted.

Indian Subcontracting Preference

Corroon alleges that Alexander did not furnish a statement with its bid as to its method for providing preferences and opportunities for training and employment of Indians. Corroon argues that since such a statement was required by the IFB, Alexander's bid was nonresponsive. In addition, Corroon asserts that not having Alexander show any preference at all toward Indian employment gave Alexander an unfair competitive advantage by saving the company the costs of subcontracting to Indian organizations and Indian-owned economic enterprises.

The IFB's provision for a statement of how a bidder's preferences and opportunities for Indian training and employment would be provided was only for information and need not have been completed by a bidder prior to bid opening. Further, we find that this provision was a contract performance requirement which pertained to how the work was to be accomplished. Thus, the Indian training and employment preference provision related to bidder responsibility, not responsiveness. *See* 41 Comp. Gen. 555 (1962); *Contra Costa*

Electric, Inc., B-190916, Apr. 5, 1978, 78-1 C.P.D. ¶ 268. Accordingly, we cannot conclude that Alexander's bid should have been rejected as nonresponsive because the company failed to provide a statement setting forth its method of providing such preferences.

We deny Corroon's protest.

[B-214561]

Accountable Officers—Physical Losses, etc. of Funds, Vouchers, etc.—Without Negligence or Fault

Relief from liability for an unexplained loss of funds being held as evidence in a criminal trial is granted under 31 U.S.C. 3527 (1982) to two deputy courtroom clerks whose negligence was superseded by such pervasive laxity in the policies, procedures, and facilities established by their superior that it would be unreasonable to require them to protest to their superior about those deficiencies.

Accountable Officers—Relief—Negligence—What Constitutes

Relief from liability for an unexplained loss of funds being held as evidence in a criminal trial is denied under 31 U.S.C. 3527 (1982) to the clerk of a United States District Court who provided facilities and established policies that were grossly inadequate to protect funds entrusted to the clerk through his subordinates.

To the Director, Administrative Office of the United States Courts, July 20, 1984:

This is in response to your request of March 2, 1984, that this office grant relief pursuant to 31 U.S.C. § 3527 (1982) to Mr. Frederick DeCesaris, Ms. Cedra Coppola, and Ms. Concetta Zinni. Your request arises as a result of the unexplained loss of $4,301 in United States currency that was being held as evidence in two criminal trials pending before the United States Court for the District of Rhode Island. For the reasons stated below, we grant relief to Ms. Coppola and Ms. Zinni, but we deny relief to Mr. DeCesaris.

Facts

On October 22, 1981, it was discovered that a total of $4,301 in United States currency was missing from an evidence "cage" used by the Clerk of the United States District Court for the District of Rhode Island. Those funds were being kept as physical evidence in two matters then pending before the court. The loss was initially discovered by courtroom deputy clerk Cedra Coppola. According to Ms. Coppola, on July 17, 1980, she received $300 in United States currency while serving as courtroom deputy clerk in a trial in which the currency was physical evidence. Ms. Coppola states that she "placed the $300 from that trial into [the evidence cage that she shared with another courtroom deputy clerk, Ms. Concetta Zinni] in a brown envelope with the word 'currency' written on the front of the envelope."

On October 22, 1981, Ms. Coppola discovered the $300 and its envelope were missing from the cage. When Ms. Coppola informed Ms. Zinni of the loss, Ms. Zinni became concerned for the safety of

some funds that had been entrusted to her in another case. On July 16, 1981, Ms. Zinni had received $4,001 in United States currency as evidence while acting as courtroom deputy clerk in a trial. Ms. Zinni states that she "placed the $4,001 in a clear plastic exhibit envelope at the bottom front left corner of cage no. 4 [the cage assigned to her and Ms. Coppola]." Ms. Zinni last recalls seeing this money in the cage on October 8, 1981. On October 22, 1981, after learning of the disappearance of the $300 entrusted to Ms. Coppola, Ms. Zinni discovered that $4,001 entrusted to her was also missing. Ms. Coppola and Ms. Zinni then informed their superior, the Clerk of the Court, Mr. Frederick R. DeCesaris, and others of the loss. A check of the evidence logs maintained in that office confirmed that the lost currency had been committed to the care of Ms. Coppola and Ms. Zinni, respectively. An investigation by the Federal Bureau of Investigation (FBI) reached no conclusive results and, we understand, has been closed.

In the meantime, Ms. Coppola and Ms. Zinni were served with demands for repayment of the missing $4,301. The demands indicated that consideration was being given to collecting the debt by means of salary offset. In response to those demands, Ms. Coppola and Ms. Zinni requested hearings on the issue of their liability for this loss. Their request is founded upon 5 U.S.C. § 5514, as amended by section 5 of the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749, 1751-52.[1] Subsequent to their request, you wrote us to request relief under 31 U.S.C. § 3527 for Ms. Coppola, Ms. Zinni and Mr. DeCesaris. We understand that your agency has postponed action on the requested hearing in order to await our response to your request.

Agency Security Procedures

According to the record that you submitted, Mr. DeCesaris, as Clerk of the Court, is responsible, among other things, for maintaining physical evidence that is turned over to the court on legal matters pending there. Ms. Coppola and Ms. Zinni are two of the "courtroom deputy clerks" who perform this task under the supervision of Mr. DeCesaris. According to an affidavit submitted by Mr. DeCesaris, in November 1979, he had installed six steel cages for the deputy courtroom clerks to use in storing evidence. The cages were placed in a walk-in vault equipped with a combination lock and a key-controlled alarm. The vault is also equipped with an

[1] We point out in passing that Ms. Coppola, Ms. Zinni and Mr. DeCesaris are accountable officers. *See, e.g.,* 59 Comp. Gen. 113, 114 (1974). *See also,* B-185486, February 5, 1976 (clerk for Eastern District of Virginia found to be an accountable officer). Under 5 U.S.C. § 5512 (1982), offset from salary is specifically authorized to recover debts owed by accountable officers as a result of the loss of funds entrusted to them. Therefore, 5 U.S.C. § 5514 does not govern the collection by offset of the debts owed in this case. If the lost funds are not otherwise recoverable, the procedures dictated by section 5512 should be followed.

inside door with a separate combination lock. Beyond the inner door of the vault is yet another key-controlled alarm system. Mr. DeCesaris describes this system as a "sound and movement" device which is directly wired to Federal police offices.

According to the record, at the time of the loss, the walls and doors of the cages were constructed of a wire mesh described as "chicken wire" or "chain link." This construction allowed one to see the contents of each of the cages without opening their doors. The cages were arranged in two rows of three, one on top of the other. Each cage was equipped with a combination lock. According to Mr. DeCesaris, the combinations of the cages were to be known only by the two deputy clerks assigned to each cage. He also states that each clerk was warned to keep the cage combinations secret, shown how to change the combinations, and instructed to change them every 6 months or sooner when security needs warrant it. These security procedures were apparently not committed to writing and there is conflict in the record as to whether instructions concerning safeguarding and changing combinations were actually given.

According to the record, the combinations to both of the vault locks and the cage assigned to Ms. Coppola and Ms. Zinni had been widely known for several years. Apparently, the combination to their cage was the same one used by the two deputy courtroom clerks previously assigned to that cage and the record suggests that many staff members knew the combination to that cage. Both of those deputy courtroom clerks had become pregnant in 1979 and there was some speculation between them and the other staff members on whether their children would be born during the month which corresponded to the numbers of their cages's combination, which was "0480." In addition, Ms. Zinni told FBI investigators that she kept the combination to their cage on a piece of paper in her desk. The record does not indicate that her desk was locked.

The combinations to the vault doors were known to several of the deputy courtroom clerks and some other courtroom employees because of the need for someone to always be available to open the vault. During the day, the alarms were disconnected and the vault doors were left unlocked and open in order to facilitate access to the cages by the deputy courtroom clerks. These policies left the vault and cages vulnerable to unsupervised visits by other court employees, building janitors, probation officers, repair persons, reporters for the local newsmedia, and members of the public, all of whom were routinely given access to the clerk's office, owing to the public nature of the records stored there. (The record indicates that the keys to the vault alarm systems were kept either on or in an unlocked desk during the daytime.) At night, the alarm keys were stored in a unlocked table drawer in Mr. DeCesaris' office.

The record indicates that there were large gaps between the doors to the cages, and the ceilings and floors of the cages. These

gaps were apparently wide enough to permit a person to remove objects from the cages without unlocking the doors. The record contains several accounts of successful efforts to do this. In one such account, it is stated by an employee of the court that, in a presence of another employee, he successfully extracted an envelope with its contents and then returned it, by means of the gap between the door and the floor of the cage assigned to Ms. Coppola and Ms. Zinni. Next, according to that individual's statement, he "attempted to retrieve a pistol from that cage * * * which was in another envelope and laying to the back of the cage. But, because that pistol was outside my reach, I could not do so." Another deputy courtroom clerk recalled that on one occasion he could not open the combination lock on his cage and "becoming impatient, I slipped an evidence envelope, with certain contents, through [the gap in my cage] without opening the door * * *. I am sure that I have done this on other occasions, specifics of which I cannot recall." According to the record, plywood walls have been placed on all of the cages and their doors, and the gaps along the doors have been eliminated since the loss.

Discussion

GAO is authorized by 31 U.S.C. § 3527 to relieve an accountable officer from liability for a physical loss of funds if GAO concurs with administrative determinations made by the requesting agency to the effect that the loss occurred while the accountable officer was acting in the discharge of official duties, and that the loss occurred without fault or negligence on the part of the accountable officer. In your letter, you advised us that you have made both determinations.

Ordinarily, the loss of funds entrusted to an accountable officer raises a rebuttable presumption of negligence on the officer's part. 54 Comp. Gen. 112, 115 (1975); B-203646, November 30, 1981. In the past, we have held upon occasion that the presumption is adequately rebutted by evidence indicating the existence of a "pervasive laxity" in the applicable security procedures which was the proximate cause of the loss incurred.[2]

At the same time, however, GAO has also held that an accountable officer has a duty to report security weaknesses to appropriate supervisory personnel and, with regard to those inadequate security conditions that are beyond the officer's control, a duty to make the best out of what is available to him or her. The determination

[2] *E.g.*, B-203646, November 30, 1981; B-204647, February 8, 1982; B-196855, December 9, 1981; B-197799, June 19, 1980; B-191942, September 12, 1979; B-191440, May 25, 1979; B-189658, September 20, 1977; B-182386, April 24, 1975; B-173133-O.M., December 10, 1973; B-177963-O.M., March 21, 1973; B-170615-O.M., Nov. 23, 1971; B-170596-O.M., November 16, 1970; B-169756-O.M., July 8, 1970; B-78617, June 24, 1949.

of whether to grant or deny relief has often turned on whether these duties were breached.[3]

Conclusions

We conclude that the security policies and procedures exercised in the Clerk's office were seriously deficient. Two deputy courtroom clerks had been assigned to work out of one cage. This denied either of them exclusive control over the items (including the lost funds) that were entrusted to them. Also, the facts discussed above demonstrate that access to the vault containing the cages was not adequately controlled.

Second, Ms. Coppola and Ms. Zinni apparently failed to make any attempt to protest the deficiencies in the office's policy, procedures, and facilities to their superiors. As accountable officers they are held, in the absence of regulations, to the standard of what the reasonably prudent and careful person would have done to take care of his or her own property of like description under like circumstances. 54 Comp. Gen. 112 (1974); B-193673, May 25, 1979. It might be argued that, in failing to realize and report to their superiors the deficiencies in the security system of the clerk's office, Ms. Coppola and Ms. Zinni failed to behave as reasonably prudent and careful persons and breached their duties as accountable officers. B-127204, April 13, 1956; B-208511, May 19, 1983.

However, we do not believe that the law requires an accountable officer to perform a useless act. The deficiencies in the policies, procedures, facilities, and practices of the clerk's office were obvious and undoubtedly known (or should have been known) to Mr. DeCesaris. Many of the most serious flaws were inherent in the policies, procedures, and facilities designed and established by him. The balance of those deficiencies apparently resulted from inadequate supervision of his subordinates and lax enforcement of those procedures which Mr. DeCesaris maintains he did establish. To require Ms. Coppola and Ms. Zinni to have protested these flaws to Mr. DeCesaris would have been a useless act. Mr. DeCesaris clearly knew or should have known of these flaws for several years and had taken no action to correct them. *Cf.* 60 Comp. Gen. 674, 676 (1981) ("if [the supervisor] had been aware of the lax security procedures then in effect * * * he would have been negligent in his duty not to have taken corrective action. * * * [H]owever, [he] did not have this knowledge and since he was not directly responsible for the security program, we cannot find him negligent."). While we do not believe that Ms. Coppola and Ms. Zinni behaved as reasonably and

[3] *See, e.g.,* 60 Comp. Gen. 674 (1981); B-208511, May 19, 1983; B-170012, August 11, 1970; B-167130-O.M., July 30, 1969; B-160228-O.M., February 8, 1967; B-139886, July 2, 1959; B-127204, April 13, 1956; B-92784, March 16, 1950. *Cf.* B-129063-O.M., September 28, 1956 (emergency conditions—unit situated in Korea during the Korean war—caused loss and were beyond the control or neglect of the accountable officer, unlike the situation in B-127204, Apr. 13, 1956).

prudently as they might have, we conclude that the pervasive laxity in the policies, procedures, and facilities established in the clerk's office were responsible for the loss. Because Mr. DeCesaris worked in the same office from which the funds were stolen, rather than at a remote location which might preclude him from being aware of the day-to-day activities in the clerk's office, the flaw in the procedures followed should have been evident to him. It would therefore be unreasonable to require Ms. Coppola and Ms. Zinni to have protested to their superior under these circumstances.

We accordingly conclude that as Clerk of the Court Mr. DeCesaris failed to provide facilities and establish and enforce policies and procedures that were reasonably calculated to protect the funds entrusted to him through his subordinates. The cages, for example, were obviously vulnerable. *Cf.* 60 Comp. Gen. 674, 676 (1981). The assignment of two deputy courtroom clerks to each cage clearly deprived them of exclusive control and thereby deprived his office of accountability among the deputy courtroom clerks for items entrusted to them. *See* B-204647, February 8, 1982. Furthermore, the security of the cages and vault area was grossly deficient, as were the design and construction of the cages themselves, and the confidentiality and routine changing of combinations apparently was not accomplished.

Based on the foregoing conclusions, we grant relief to Ms. Coppola and Ms. Zinni, but we deny relief to Mr. DeCesaris because we cannot conclude that this loss occurred without significant negligence or fault on his part.

[B-214806]

Military Personnel—Reservists—Death or Injury—Inactive Duty Training, etc.—Injured While Traveling

An Army Reserve member injured in an automobile accident while returning to his permanent station after attending inactive duty training at a training site away from his unit headquarters under travel orders is not entitled to the medical benefits of 10 U.S.C. 3721(2), since he had completed the training duty involved and he was not under military control employed in inactive duty training at the time of the accident.

Matter of: Staff Sergeant Elmer Hall, Jr., July 23, 1984:

An Army Reserve member ordered to duty at a training site away from his unit headquarters for a period of inactive duty training was injured in an automobile accident while traveling between the training site and his headquarters upon conclusion of the training. We are asked whether in the circumstances described the member was performing inactive duty training while traveling in order to qualify for medical benefits under 10 U.S.C. § 3721(2).[1]

[1] The Assistant Secretary of the Army (Financial Management) submitted this request for a decision and it has been assigned control number SS-A-1435 by the Department of Defense Military Pay and Allowance Committee.

Since the member had completed and been released from his training assignment, he was not under military control engaged in inactive duty training at the time the injury occurred and not entitled to the benefits of 10 U.S.C. § 3721(2).

Staff Sergeant Elmer Hall, Jr., a United States Army Reserve member assigned to a Reserve unit headquarters in Hazard, Kentucky, was ordered to perform inactive duty training in Avon (near Lexington), Kentucky, on March 19, and March 20, 1983, by Orders 03-298, Headquarters, 100th Division (Training), Louisville, Kentucky, dated March 7, 1983. His orders directed that he proceed on temporary duty from Hazard, report to the training site not later than 9 a.m. March 19, and return to Hazard at the conclusion of training. He was authorized per diem during the training period and travel allowances for roundtrip between Hazard and Avon.

Sergeant Hall was injured in an automobile accident near Van Cleve, Kentucky, on the direct route between Avon and Hazard at approximately 5 p.m., March 20, 1983, while returning from training. The location of the accident was such that he could have been traveling to his headquarters or to his home.

The Assistant Secretary notes that under 10 U.S.C. § 3721(2) an Army Reserve member is entitled to medical benefits when he is called or ordered to perform inactive duty training and is disabled in line of duty "while so employed" and questions whether Sergeant Hall was performing inactive duty training while traveling in order to qualify for medical benefits. The submission cites our decision 43 Comp. Gen. 413 (1963) which states that situations of this nature where a question exists whether injuries suffered by Reserve members were incurred while employed in performing inactive duty training should be forwarded to this Office for direct settlement rather than following the decision of the Court of Claims in *Meister* v. *United States,* 162 Ct. Cl. 667 (1963).

The Court of Claims in *Meister* ruled that a Naval reservist who sustained an injury just outside the Reserve center immediately prior to beginning inactive duty training was "within the scope of his duties" and, therefore, entitled to coverage under 10 U.S.C. § 6148 which applies to Naval reservists. However, the court stated that they were not attempting to lay down a rule of general application in that case. We recognized the limited application of the court's decision in *Meister* and determined that it should not be used as precedent for favorable administrative action in any similar case. Our rule remained that when a reservist is ordered to inactive duty training, the periods of training for which they are entitled to medical and continuation pay benefits are limited to periods while they are "so employed," that is, beginning with the time the person is first mustered or assembled and ending with dismissal from the particular drill or other training duty involved. See 38 Comp. Gen. 841, 843 (1959); 43 Comp. Gen. 412, 415 (1962); and *Master Sergeant Edward O. King,* B-189360, December 30, 1977. We

have not allowed claims where the injury occurred after completion of dismissal at the end of inactive duty training. *Electronics Technician Michael S. Beam,* 63 Comp. Gen. 66 (1983).

We have also held that under the predecessor to 10 U.S.C. § 3721, Reserve officers traveling under competent orders to and from inactive duty training for the purpose of inspecting and supervising training of subordinate elements of their unit located at such distance from the parent headquarters as to require the expenditure from appropriated funds for transportation, subsistence, and quarters, who were injured or killed while traveling did not suffer such injury or accident while employed in an inactive duty training status. We stated that our answer would be the same whether the member proceeded from his headquarters to the point where the inactive duty training was performed or proceeded directly from his home to the point where such duty was performed. 32 Comp. Gen. 554 (1953).

In one case where a National Guard member was in attendance at an inactive duty training assembly and was instructed by his first sergeant to take the most direct route to his home, obtain his clothing records and return to the Armory, he had an accident and was injured returning to the Armory. In that case, the member had been mustered in at the beginning of the drill, he was traveling pursuant to his sergeant's instructions and not because of any omission on his part, and the drill had not been completed. We held there that the member was under military control and was engaged in inactive duty training at the time of the accident, thus being entitled to the benefits of being disabled in line of duty from injury while so employed. See 54 Comp. Gen. 165 (1974). Compare 52 Comp. Gen. 28 (1972), a somewhat similar case where the opposite conclusion was reached because of a crucial difference in the facts.

In the present case, Sergeant Hall's inactive duty training consisted of attending a drill sergeant update course away from his usual duty site. From the record we have been furnished it seems clear that prior to his accident he had completed the training duty and had been released from military control at the training site. The provision in his travel orders directing return travel to his permanent station upon completion of the temporary duty was necessary in order to compute travel allowances and not because any duty was to be performed there. See Joint Travel Regulations, Volume 1, para. M6001 (Change No. 358, December 1, 1982). The period that he was employed in inactive duty training was that time he was engaged in meeting the requirements of the drill sergeant update course. When he was dismissed from that particular training duty, his inactive duty training ended and he was no longer "so employed" within the meaning of 10 U.S.C. § 3721.

This situation differs from the circumstances in 54 Comp. Gen. 165 where the training duty had not been completed and the

member was traveling at the discretion and under the control of the officer in charge of the training at the time he was injured. Sergeant Hall had completed his training duty and was returning to his headquarters or his home. Since the injury occurred after the completion of the training and away from the training site, we must conclude that the injury was not incurred while Sergeant Hall was performing inactive duty training.

Accordingly, Sergeant Hall is not entitled to the benefits provided under 10 U.S.C. § 3721(2).[2]

[B-215260]

Purchases—Small—Limitations—Exceeded

When contract is properly awarded under the small purchase procedures, but actual value of work performed exceeds $10,000 limit, agency may pay for unforeseen additional work at original unit prices.

Matter of: Jones Seeding & Sprigging Co., July 23, 1984:

The Soil Conservation Service (SCS), Department of Agriculture, requests an advance decision on payment of a claim submitted by Jones Seeding & Sprigging Co. for plunge basin repair at the Jack Creek Watershed Project. The claim arises from a purchase order issued by the SCS office in Stillwater, Oklahoma. We find that the contract was properly awarded under the small purchase procedures, applicable at the time to procurements that do not exceed $10,000, and that SCS may pay Jones for the additional work performed, even though it exceeds that amount.

Original quantities and unit prices for equipment, materials, labor, and incidentals required to perform the erosion control measures at Jack Creek Watershed were as follows:

Description	Quantity	Unit Price	Amount
Mobilization	1	$1,500	$1,500
Earthfill embankment	90	$4/cu. yd	360
Riprap	134	40/cu. yd	5,360
Riprap bedding	52	40/cu. yd	2,080
Total			$9,300

[2] We note that 10 U.S.C. § 1074a and 37 U.S.C. § 204(j), added by section 1012 of the Department of Defense Authorization Act, 1984, Pub. Law 98-94, Sept. 24, 1983, 97 Stat. 664-665, now authorize the services to provide specified benefits when a member is injured while traveling directly to or from the place at which he performs inactive duty training. These new provisions are not applicable in this case because they only apply to injuries incurred or aggravated on or after the date of enactment of Pub. Law 98-94, that is, September 24, 1983.

Accordingly, SCS awarded Jones a fixed price contract for this amount.

Actual quantities, however, differed from those estimated by SCS. By completion in August 1983, Jones had provided 195 additional cubic yards of earthfill embankment, 12 cubic yards of additional riprap, and 10 fewer cubic yards of riprap bedding; it also had billed SCS $35 for one hour's use of miscellaneous equipment. The total value of work performed by Jones—at the original unit prices—amounts to $10,195. The purchase order was amended to that amount, but SCS has paid Jones only $10,000, as it believes it does not have authority to pay the additional $195 under the applicable regulation which limited small purchases to those not exceeding $10,000. *See* Federal Procurement Regulations, 41 C.F.R. § 1-3.600 (1983).

We find that the SCS may pay Jones' $195 claim. At the time the original purchase order was executed, quantity estimates were in fact within the $10,000 small purchase authority. The Jack Creek Watershed Project engineer states that the higher final cost of the procurement is due both to more detailed surveys than were available when the original quantities were calculated and to additional wash-out that occurred after the project was surveyed.

The limitation on use of the small purchase procedures governs the procedures used in awarding a contract. We do not believe it has applicability to a contract already awarded which, for appropriate reasons, must be modified. Here, the original award, at $9,300, was properly made under the small purchase authority, and we see no reason why the contract may not now be modified to cover the additional work made necessary by unforeseen circumstances.

Accordingly, SCS is authorized to pay Jones' claim.

[B-212953]

Indian Affairs—Bureau of Indian Affairs—Judgment Fund Distribution—Payment Under IRS Levy—Authority

The Bureau of Indian Affairs, Department of Interior, is authorized to comply with an Internal Revenue Service Notice of Levy on a Klamath Indian's individual share of a judgment fund distributed under Pub. Law 89-224, 25 U.S.C. 565-565g. Statutory levy authority of IRS (26 U.S.C. 6331) applies to funds in hands of another Federal agency, and is not diminished by the terms of the judgment distribution statute in this case.

Matter of: Bureau of Indian Affairs—Payment of Judgment Share to Internal Revenue Service under Notice of Levy, July 24, 1984:

This responds to a request by the Deputy Assistant Secretary for Indian Affairs, Department of the Interior, for our decision on whether the Bureau of Indian Affairs (BIA) is authorized to pay a Klamath Indian's share of a judgment fund being distributed under Public Law 89-224 to the Internal Revenue Service (IRS) under a

Notice of Levy. In the course of preparing our response to the Department's request, we solicited the views of the IRS on this matter and we have considered the comments offered by the Service in formulating this decision. For the reason stated below, we hold that the Bureau should comply with the Notice of Levy.

Background

On December 20, 1982, the United States Court of Claims rendered a judgment in the amount of $16,500,000 against the United States and in favor of the Klamath Indian Tribe and others (Docket No. 100-B-2). This Office certified the judgment for payment on January 10, 1983. Public Law 89-224, enacted in 1965, governs the distribution of judgment funds to the Klamath Indians.[1] Pursuant to that statute, the BIA divided the judgment fund into individual shares for per capita distribution to each living adult member of the Klamath tribe whose name appeared on the final membership role compiled under the Klamath Termination Act (except in certain cases not relevant here). 25 U.S.C. § 565a. We understand that the Bureau has distributed most of the individualized shares to the persons who are entitled to them.

According to the IRS, one Tribal member, entitled to a share of $7,454.39, owes $13,642.23 in delinquent Federal taxes as a responsible person liable for the unpaid trust fund employment taxes due from a corporation of which he was incorporator, stockholder, director, and officer.[2] The IRS has levied on the funds in the BIA's possession which the Bureau has individualized as the member's share. The Bureau is holding the share pending our decision.

The Issue

The BIA and the IRS disagree over whether the Bureau may legally comply with the Notice of Levy. The Service's position is that the Internal Revenue Code provisions governing IRS property seizures for tax collections, I.R.C. (26 U.S.C.) §§ 6331 and 6332, and court decisions interpreting them require the Bureau's compliance. The Bureau believes that the statute which prescribes how it must distribute judment funds to the Klamath Indians, Public Law 89-224 (cited above), prohibits it from complying with the Notice. The Bureau is concerned that it could be liable for breach of trust if it paid over the judgment share in question to the IRS.

Discussion—IRS Statutory Levy Authority

The general authority of the Internal Revenue Service to levy upon delinquent taxpayers' property is clearly provided for in the

[1] Pub. L. No. 89-224, codified at 25 U.S.C. §§ 565-565g, was enacted to govern the distribution of a 1964 Indian Claims Commission award, but by its terms applies to future judgments as well.

[2] Although not specifically raised as an issue, we note that the Tribal member is personally liable for the amount of withholding tax not paid by the corporation of which it is an officer under I.R.C. §§ 6671 and 6672.

Internal Revenue Code. Section 6331 specifies that if a taxpayer does not pay any tax he owes within 10 days after notice and demand for payment, it is lawful for the IRS, as the Secretary of the Treasury's delegate, to collect the unpaid tax "by levy upon all property and rights to property belonging to such person * * *." I.R.C. § 6331(a). Subsection (b) defines levy as including "seizure by any means." Section 6332(a) requires any person who is in possession of property or rights to property subject to levy upon which levy has been made, to surrender such property to the IRS. Section 6334(a) lists various exemptions from the levy authority, none of which apply here, and section 6334(c) states that "Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)."

The IRS may validly serve a Notice of Levy upon another Government agency which must be honored under sections 6331 and 6332. *United Sand and Gravel Contractors, Inc.* v. *United States,* 79-1 U.S.T.C. § 9240 (W. D. La. 1979). In *United Sand* the plaintiff contended that the Internal Revenue Code did not contemplate the IRS levying upon another agency of the United States and therefore an IRS levy served upon the U.S. Army Corps of Engineers had no effect on the period of limitations which the plaintiff argued was applicable in its suit brought under I.R.C. § 7426. The court rejected the plaintiff's contention stating:

> The IRS does not levy upon the person or the entity in possession of the property; it levies upon the property. "Levy" is nothing more or less than "seizure." Black's Law Dictionary 1051 (4th ed.). The IRS is duty bound to pursue the collection of taxes diligently and has been empowered by Congress to levy "upon all property" belonging to the taxpayer for the payment of the tax. 26 U.S.C. § 6331.
>
> Though we are not aware of any cases directly deciding the issue of whether or not the IRS can levy upon property held by another agency of the government, the practice is certainly not uncommon. It often occurs that the IRS levies on property held by the government after a seizure by the government in a criminal proceeding. * * *
>
> The IRS has the right to levy against property where it finds it.

In addition, 38 Comp. Gen. 23 (1958), reaching the same result, is squarely on point. In that case, the (then) Post Office Department asked whether a notice of levy served under I.R.C. § 6331 could reach funds in a postal savings account of a delinquent taxpayer. The Post Office Department raised the question because postal savings are trust funds. Holding that the funds were subject to the IRS levy under I.R.C. §§ 6331 and 6334(c), we said:

> In view of the foregoing provisions of law all that is necessary to determine for the purpose of applicability of section 6331(a), is whether postal savings are "property or rights to property" belonging to the delinquent taxpayer. 38 Comp. Gen. at 24. *See also* 35 Comp. Gen. 620 (1956).

As the court pointed out in the *United Sand* case discussed above, if the levy is wrongful, the aggrieved taxpayer has a remedy in the form of a civil action under I.R.C. § 7426.

Accordingly, the Internal Revenue Code authorizes the IRS to levy upon the Klamath Indian's individual judgment share and the Notice of Levy applies to funds in the hands of the BIA, unless there is some independent reason that would preclude application of that authority in this case.

Public Law 89-224

The BIA suggests that Public Law 89-224 may prohibit it from paying a Klamath Indian claimant's share to his creditors, including the IRS. The Bureau bases its view primarily upon his interpretation of section 2 of the Act, 25 U.S.C. § 565a, which provides:

> A distribution shall be made of the funds * * * to all persons whose names appear on the final rolls of the Klamath Tribe * * *. Except as provided in subsection (b), (c), (d), and (e) of this section, *a share or portion of a share payable to a living adult shall be paid directly to such adult;* (b) a share payable to a deceased enrollee shall be paid to his heirs or legatees * * * (c) a share payable to an adult under legal disability shall be paid to his legal representative: (d) a share payable to a person previously found to be in need of assistance * * * may be paid directly to the individual or, * * * it may be added to the trust now in force on behalf of said individual * * * and (e) a share * * * payable to a person under age of majority * * * shall be paid to parent, legal guardian, or trustee of such minor. [Italic supplied.]

The Bureau argues that by using the word "directly" in the emphasized phrase, the Congress indicated its intention that the BIA be prohibited from disbursing an enrollee's share to any of his creditors including the United States. If it is directed to pay a share directly to an enrollee, it is precluded from paying it to anyone else, the Bureau reasons.

We disagree with this interpretation. When the context of 25 U.S.C. § 565a is viewed as a whole, it seems clear that the Congress used the word "directly" to indicate merely that payments should be made to the individual rather than to someone else on that individual's behalf in some trust or fiduciary capacity, except in the specific situations noted in subsection (b) through (e). Nothing in the legislative history suggests a different reading. The use of the word "directly" again in the same context in subsection (d) reinforces this interpretation.

In addition, an opinion by the BIA Regional Solicitor's office, Pacific Northwest Region, included with the submission, takes the position that the legislative history of Public Law 89-224 also supports the Department's conclusion that Congress intended the Secretary of the Interior to distribute Klamath judgment funds only to the enrollees and not to their creditors, including the United States. The Regional Solicitor notes that the bill which became Public Law 89-224 (S. 664, 89th Cong., 1st Sess.) and others which Congress considered along with it, originally contained a provision which specifically addressed the question of the payment of judgment shares to enrollees' creditors. It provided:

> No part of any of the funds distributed per capita shall be subject to any lien, debt, or claim of any nature whatsoever, except delinquent debts owned to the United States * * *. S. 664, 89th Cong., 1st Sess. § 8 (1965).

This provision was not in the final version of the bill which Congress enacted. The Regional Solicitor argues that "the intentional deletion of language which would have expressly permitted the disbursement of these funds to pay a debt which the distributee owed to the United States is persuasive that Congress considered such a distribution and concluded that these funds should not be distributed in such a manner."

The legislative history is completely silent on the reasons for the deletion of the "debt" provision. Thus, while it can perhaps be argued, as BIA does, that the deletion was intended to insulate payments against liability for delinquent Federal taxes, it is at least equally arguable that the deletion was designed to remove statutory insulation for non-Federal debts. Without any explanation in the legislative history, we view the deletion of the debt provision as inconclusive. Also, it is significant to note that the deleted debt provision would not have created the liability for delinquent Federal debts. That liability already existed. The deleted provision would simply have made it clear that the protection against liability for non-Federal debts did not extend to delinquent Federal debts.

To test our interpretation, we reviewed a number of other Indian judgment fund distribution statutes. We found several that use the word "directly" in the same manner as 25 U.S.C. § 565a, and that also include a debt provision similar to the one that was deleted from S. 664. See, for example, 25 U.S.C. §§ 773(a) and (c) (certain Indian Tribes of Oregon); 25 U.S.C. §§ 873(a) and (c) (Otoe and Missouria Indians); 25 U.S.C. §§ 964(a) and 965 (Omaha Tribe); 25 U.S.C. §§ 992 and 995 (Cherokee Nation). If the word "directly" had the meaning ascribed to it by BIA, a separate provision insulating the funds from liability for non-Federal debts would have been unnecessary. In other words, if BIA were correct, it would follow that the word "directly" would be missing in those statutes that included the debt provision. We also found instances where the word "directly" is used without a debt provision. *Eg.,* 25 U.S.C. §§ 788c and 788g (Creek Nation); 25 U.S.C. § 1035 (Shawnee Tribe). Our review reinforces our conclusions that (1) the term "directly" in the distribution formula has no bearing on the liability of the funds for the distributee's indebtedness, and (2) when Congress wishes to protect judgment funds from liability for indebtedness, it has done so by the inclusion of specific provisions to that effect.

We therefore find nothing in Public Law 89-224 that lessens the applicability of section 6331 of the Internal Revenue Code.

Compliance Not Breach of Trust

The Department is also concerned that complying with the Notice of Levy would constitute an actionable breach of trust. It notes that in *United States* v. *Mitchell,* 77 L. Ed. 2d 580 (1983), the

Supreme Court held that the BIA acts as a trustee when managing Indian property of funds under statutory direction and that the United States is liable for money damages for breach of that trust. The Department is concerned that it will be in breach of trust if it pays a share of the judgment fund to anyone other than those persons specified in section 2 of Public Law 89-224.

Mitchell was a suit brought by Quinault Reservation allottees against the United States for alleged mismanagement of Reservation timber lands by the Department of the Interior. Under various statutes and regulations, the Department was responsible for continually managing Reservation timber on a sustained yield basis and for selling the timber based "upon a consideration of the needs and best interests of the Indian owner and his heirs." The allottees alleged that the Department had mismanaged their timber lands by failing, among other things, "to obtain a fair market value for timber sold, failing to manage timber on a sustained-yield basis, failing to obtain any payment at all for some merchantable timber and failing to develop a proper system of roads and easements for timber operations." Acting on the United States' motion to dismiss, the Court ruled that the statutes and regulations requiring the Department to manage timber for the Indians' benefit established fiduciary obligations on the Department and that the Government would be liable for money damages for breach of trust if the allottees's allegations were proven.

We do not read the *Mitchell* decision as in any way inconsistent with our decision in this case. The basis for the holding in *Mitchell* was that the underlying statutes involved in that case created a fiduciary duty. While we do not question that the BIA acts generally in a trust capacity when it holds funds on behalf of Indian Tribes or individual Indians, the underlying statute in this case, Public Law 89-224, as we have discussed, does not impose upon the BIA a duty to make payment in disregard of a statutory levy for delinquent Federal taxes. Thus, honoring the IRS Notice of Levy would not violate the BIA's trust responsibility.

In sum, for the reasons discussed above, we conclude that the BIA should pay over the funds in question to the IRS pursuant to the Notice of Levy issued under the authority of 26 U.S.C. § 6331.

[B-213279]

Buy American Act—Domestic or Foreign Product—All-or-None Basis for Award—Effect

Solicitation's all-or-none basis for award does not make the protester's bid on certain line items a domestic bid for those items under the Buy American Act (41 U.S.C. 10a-d (1982)). An all-or-none bid cannot be used to characterize bid items clearly foreign as domestic on the ground that those bid items represent less than 50 percent of the total bid.

Buy American Act—Price Differential—Application Property

General Accounting Office finds that agency unreasonably applied Buy American Act differential to certain line items as integrated units when solicitation indicated that integrated units were composed of different line items. Protest is sustained because applying differential as indicated by solicitation would have made the protester the low evaluated bidder.

Matter of: Essex Associates, Inc., July 24, 1984:

Essex Associates, Inc. (Essex), protests the award of a contract under invitation for bids (IFB) No. YA 551-IFB3-340045, issued by the Department of the Interior (Interior), Bureau of Land Management. The IFB was a total small business set-aside for windmills, towers, well cylinders and pump rods. Performance under the contract has been completed and all items have been accepted by the Government.

Essex claims that a foreign bid differential of 12 percent was improperly added to its low bid under the Buy American Act (41 U.S.C. §§ 10a-d (1982)). According to Essex, the cost of its foreign items represented ony 46 percent of its total bid, less than the 50-percent criterion specified by the IFB for determining whether a bid was foreign.

For the reasons set forth below, the protest is sustained.

Section "E" of the IFB, the bid schedule, listed the bid items as follows:

Item No.	Supplies/Services	Quantity
1	TOWER, 27 foot to accommodate 10 foot windmill	5
2	TOWER, 27 foot to accommodate 8 foot windmill	6
3	WINDMILL, 10 foct motor, vane assembly to fit item 1 above.	5
4	WINDMILL, 8 foot motor vane assembly to fit item 2 above	6
5	WELL CYLINDERS	11
6	PUMP RODS to fit item 5 above	1,407

The bid schedule called for the bidders to provide unit prices for the six bid items. However, the IFB also provided that "TOTAL ALL OR NONE" bids were to be submitted by the bidders.

Five bids were received by Interior at bid opening. Essex submitted the aggregate low bid of $19,875.54. In response to the IFB's Buy American Certificate clause, Essex stated that bid items 3 and 4 were "100% Argentina" made. Essex also stated that the combined amount for these two bid items represented 46 percent of Essex's total bid. Interior found the windmills and towers portion of Essex's bid to be foreign and in accordance with the Foreign Bid Differential clause in section "C" of the IFB added 12 percent to Essex's combined prices for bid items 1 through 4. As a result, Essex's evaluated bid for the six bid items was $21,829.98. Award was made to Dean Bennett Supply Co., Inc., at $21,173.73.

Essex contends that, because section "E" of the IFB called for all-or-none bids, award was to be made to one contractor based on the lowest "total price." Essex further argues that the IFB's Foreign Bid Differential clause specifically provided that a total bid would be considered foreign only if the cost of foreign materials is more than 50 percent of the total bid. Essex therefore takes the position that because its Buy American Certificate stated the cost of foreign materials as 46 percent of the total bid, Interior should not have applied a 12-percent bid differential.

In the alternative, Essex contends that even if its bid was in part foreign, Interior should not have applied the 12-percent differential to Essex's combined bid price for bid items 1 through 4. Essex argues that all six bid items are separately usable. Essex concludes that since bid items 3 and 4 were the only foreign items in its bid, the IFB's 12-percent differential should only have been applied to these two bid items. Essex notes that if Interior had so limited the application of the 12-percent differential, Essex would have been the low bidder.

Interior argues that bid items 1 through 4, towers and windmills, were integrated units and thus constituted a separably usable portion of the total bid. According to Interior, bid item 5, well cylinders, and bid item 6, pump roads, were also separably usable from the towers and windmills. Interior points out that the bid schedule and section "F" of the IFB, Specifications/Description, specified that the towers and windmills were to be constructed to "accommodate" each other. Since the windmills bid by Essex were 100 percent foreign, Interior asserts that their price constituted more than 50 percent of the windmills and towers portion of Essex's bid. Interior therefore takes the position that the bid item 1 though 4 portion of Essex's bid was foreign.

An all-or-none bid cannot be used collectively to characterize bid items which are clearly of foreign origin as domestic merely because the items represent less than 50 percent of the total bid. See 47 Comp. Gen. 676 (1968). Since Essex's Buy American Certificate expressly stated that the windmills it would supply were 100 percent foreign made, Essex's bid was at least foreign for those two bid items.

The essential question is whether Interior should have applied the 12-percent foreign bid differential factor to Essex's prices for IFB bid items 1 through 4 combined. The Federal Procurement Regulations (FPR), 41 C.F.R. § 1-6.104-4(b) (1983), provide that where individual bid items being procured under a single solicitation bear such an interrelationship with each other, they may be evaluated together for purposes of the Buy American Act. See *Imperial Eastman Corporation, Thorsen Tool Company,* 53 Comp. Gen 726 (1974), 74-1 CPD 153. As noted by Interior, the IFB's bid schedule and specifications clearly stated that the windmills and towers

were to accommodate each other. Moreover, paragraph 13(a) of section "C" of the IFB provided that a total bid, an article separably usable and covered by an individual bid item, or a single unit of a multiunit item if separably usable would be considered foreign if the cost of the foreign materials was more than 50 percent of the total bid, bid item, or unit, respectively.

While the IFB did not specifically designate the windmills and towers as multiunit bid items, we find that it was reasonable for Interior to treat the towers and the corresponding 8- or 10-foot windmills as integrated units in applying the Buy American Act. See *Dubie-Clark Company Patterson Pump Division,* B-189642, February 28, 1978, 78-1 CPD 161. However, we disagree with Interior's consideration of the towers and both sizes of windmills as one single integrated unit in determining whether Essex's bid was foreign in part. Since the IFB specified that bid item 1, five 27-foot towers, was to accommodate bid item 3, 10-foot windmills, and that bid item 2, six 27-foot towers, was to accommodate bid item 4, 8-foot windmills, we find that at the very least there were two separate integrated tower and windmill units.

Furthermore, we question whether bid item 5, well cylinders, and bid item 6, pump rods, should not have also been considered part of the integrated tower and windmill units. In this regard, we note that the IFB called for a quantity of 11 well cylinders, an amount equal to the sum of the two separate integrated tower and windmill units required by the IFB. In addition, the IFB specifically stated that the pump rods were to fit the well cylinders. Based on the above, it appears that, for purposes of the Buy American Act, the integrated units were (a) items 1, 3, and appropriate portions of items 5 and 6 and (b) items 2, 4, and the remaining portion of items 5 and 6.

FPR, 41 C.F.R. § 1-6.101(d) (1983), defines an end product manufactured in the United States as being a "domestic source" end product if the cost of its components which are mined, produced or manufactured in the United States exceeds 50 percent of the cost of all its components. The record shows that Essex's bid for the domestic-made towers in bid item 2 was $642 for each tower. In view of the fact that Essex's bid on the Argentine-made windmills (item 4), for these towers was $610 each, we find that the company's bid on these six tower and windmill units was domestic. Therefore, since items 5 and 6 were domestic, at the most, the only portion of Essex's bid to which the 12-percent foreign bid differential was the five tower and windmill units of items 1 and 3 and the appropriate portions of items 5 and 6 combined.

Essex's bid on the 10-foot foreign-made windmills was nearly twice as much as the domestic-made towers. Based on our calculations, then, it appears that bid for those integrated was foreign, irrespective of the impact of domestic items 5 and 6.

The record shows that Essex's bid on bid items 1 and 3 combined was $8,775. Applying the 12-percent foreign bid differential to this figure, an evaluation factor of $1,053 should have been added to Essex's bid of $19,875.54. This, in turn, would have made Essex's evaluated bid $20,928.54, lower than the $21,173.73 bid of Dean Bennett Supply Co., Inc. In addition, we find that because Essex's prices for bid items 5 and 6 represented only a small portion of the company's total bid, Essex's evaluated bid would still be low even if the 12-percent factor had been applied to the appropriate portions of bid items 5 and 6.

We sustain Essex's protest.

In view of the fact that the contract has been fully performed, we cannot recommend corrective action. Nevertheless, we recommend that in the future Interior specifically designate in the solicitation what the multi-line item integrated units are so that bidders may have a clear understanding of how the Buy American Act will be applied. As can be seen from our above discussion, the failure to designate what constitutes integrated units can readily result in different evaluated prices and/or different low bidders.

[B-214432]

Experts and Consultants—Status—Travel and Relocation Expenses

Where an individual consultant's services were procured under a contract which established an employer-employee relationship with the Government rather than an independent contractor relationship, his entitlement to travel and relocation expenses is determined by the statutes and regulations concerning reimbursement for travel and relocation expenses of Government employees. Where the consultant was apparently employed in a manpower shortage position, he may be allowed reimbursement under 5 U.S.C. 5723 for his travel expenses and for the transportation of his household goods and dependent from his residence at the time of his initial employment to his duty station, but not for return to his residence upon completion of the contract.

Experts and Consultants—Leaves of Absence—Accrual

A consultant whose services are secured on an employment rather than an independent contractor basis is entitled to accrual of annual and sick leave, if he is eligible under the applicable provisions of law. The consultant is entitled to leave accrual where it appears he had a regularly scheduled tour of duty. In addition, the consultant is entitled to compensation for holidays on which he did not perform any work since his contract contained an express provision to that effect.

Matter of: Lynn Francis Jones, July 25, 1984:

The basic issues before us concern the entitlement to transportation of dependent and household goods and compensation for leave of Mr. Lynn Francis Jones, an individual consultant hired under a personal services contract under authority of 5 U.S.C. § 3109.[1] Spe-

[1] This matter comes before us pursuant to a request for a decision presented by Mr. C. K. Hardy, Finance and Accounting Officer, U.S. Army, White Sands Missile Range, New Mexico.

cifically, the questions concern whether he is entitled to reimbursement of the costs of the transportation of his dependent wife and household goods from his residence at the time of his initial employment to the locality of his duty station and return upon the completion of his service under the contract. We are also asked whether he is entitled to leave benefits as an employee of the Government under the contract.

We find that the personal services contract in this case creates an employer-employee relationship rather than an independent contractor relationship; thus the consultant is entitled to reimbursement for travel and relocation expenses on the same basis as a Government employee. As an appointee to a manpower shortage position Mr. Jones may be allowed reimbursement for his travel expenses from his place of residence at the time of his appointment to the locality of his duty station together with the transportation thereto of his wife and household goods. However, there is no authority to reimburse him for the return transportation of his wife and household goods to his place of residence. We also find that he is entitled to accrue annual and sick leave.

FACTS

Effective May 20, 1982, Mr. Jones, a British citizen, was employed by the U.S. Army White Sands Missile Range, New Mexico, under a personal services contract as an Operations Research Analyst and consultant. The "principal place of performance" of the contract was designated to be the White Sands Missile Range. The contract provided that the services to be rendered by Mr. Jones were to be performed "under Government supervision." In addition, the contract included terms for payment to be made to Mr. Jones of fixed biweekly amounts of compensation, accrual of sick and annual leave, payment for holidays, and Government furnished equipment, supplies, furniture, telephone and office space. The term of the initial contract was through September 30, 1982,[2] and the record shows that from the outset it was intended that these services were to be rendered through April 30, 1983, and subsequently through April 30, 1984.

Contract line item 0002 contained the following authorization:

> Travel, per diem, and moving expenses from residence to regular place of employment. To be reimbursed in accordance with Standardized Government Travel Regulations.

Mr. Jones was reimbursed by the Army for his travel from London, England, to El Paso, Texas, and the transportation of his wife and his household goods from England to El Paso incident to

[2]Paragraph 22-204.2 of the Defense Acquisition Regulation provides that a contract for the procurement of experts and consultants under 5 U.S.C. § 3109 shall not cross fiscal years.

his reporting for duty. Apparently, Mr. Jones resided in El Paso which is near White Sands, during the period of his employment. Mr. Jones was reimbursed by the agency in the total amount of $3,105.65 for the transportation of his household goods ($2,546.65) and for his wife's air fare ($559). We are now asked whether such reimbursement was proper. The question also arises as to whether he may be authorized reimbursement for the return transportation of his wife and household goods to London upon the expiration of his contract.

The contract for Mr. Jones' personal services as a consultant was entered into in May 1982 pursuant to the authority contained in section 703 of the Department of Defense Appropriation Act, 1982, Public Law 97-114, December 29, 1981, 95 Stat. 1565, 1578. That provision in pertinent part authorized the Secretary of Defense and the Secretaries of the Army, Navy, and Air Force to procure services in accordance with 5 U.S.C. § 3109 and to pay to the individuals involved, in connection with such employment, their expenses of transportation and per diem in lieu of subsistence while traveling from their homes or places of business to their official duty stations and return as may be authorized by law.[3] The Army's authority to hire experts and consultants under 5 U.S.C. § 3109 continued in effect under similar authority contained in appropriations acts for fiscal years 1983 and 1984.[4]

EMPLOYER-EMPLOYEE RELATIONSHIP

When authorized by an appropriation or other statute an agency may procure by contract the temporary (not in excess of 1 year) or intermittent services of experts and consultants without regard to the provisions governing appointments in the Federal service. 5 U.S.C. § 3109. In view of the purely personal nature of the services provided to the Army by Mr. Jones as an individual and of the contract provision for Government supervision over the services rendered by Mr. Jones, we regard the contract as establishing an employer-employee relationship between him and the Government rather than an independent contractor relationship. See 26 Comp. Gen. 188 (1946), 27 Comp. Gen. 46 (1947) and 53 Comp. Gen. 542 (1974).

TRAVEL AND TRANSPORTATION EXPENSES

An expert or consultant employed under a personal services contract which establishes an employer-employee relationship is sub-

[3] In addition, section 704 of Public Law 97-114 (31 U.S.C. 700) waived the provisions of law prohibiting payment of compensation to, or employment of, any person not a citizen of the United States for personnel of the Department of Defense.

[4] See sections 703 and 704 of Public Law 97-377, 31 U.S.C. 700, December 21, 1982, 96 Stat. 1830, 1849 and sections 703 and 704 of Public Law 98-212, December 8, 1983, 97 Stat. 1421, 1437.

ject to the laws of general application to Government employees. See B-125559, July 30, 1957, and 53 Comp. Gen. 542 (1974). As an employee, Mr. Jones' entitlement to reimbursement for travel and relocation expenses is restricted to the travel and relocation entitlements specifically authorized by law and implementing regulations for Government employees. 25 Comp. Gen. 731 at 733 (1946), 27 Comp. Gen. 695, 697 (1948), B-167815(1), January 13, 1970, and *John P. Quillin,* B-180698, August 19, 1974. Compare B-88975, October 27, 1949. With regard to the authorization of travel expenses and per diem for experts and consultants procured under contract pursuant to 5 U.S.C. §3109, the Defense Acquisition Regulation provides:

> * * * the contract may provide for such per diem and travel expenses as would be authorized for a Government employee, including actual transportation and per diem in lieu of subsistence while the expert or consultant is traveling between his home and place of business. Paragraph 22-201(a), Defense Acquisition Regulation.

That regulation is consistent with the view that as a contract employee under authority of 5 U.S.C. § 3109 Mr. Jones is entitled to those travel expenses which may be authorized for a Government employee including experts and consultants.

The record shows that some agency officials including the contracting officer believe that paragraphs 7-503.2, 15-205.25(a) and 15-205.46(e) of the Defense Acquisition Regulation provide authority to authorize round-trip transportation for Mr. Jones' wife and for the transportation of his household goods notwithstanding the limitations contained in the laws and regulations providing travel and relocation benefits for Government employees.

Paragraph 7-503.2 of the Defense Acquisition Regulation provides that in a personal services contract entered into by an individual, other than an alien scientist, the contract shall contain the following clause:

> the Contractor shall be paid (i) a per diem rate in lieu of subsistence for each day the Contractor is in a travel status away from his home or regular place of employment in accordance with Standardized Government Travel Regulations as authorized in appropriate Travel Orders, and (ii) such other transportation expenses as may be provided for in the Schedule.

In his determination and findings dated November 4, 1983, the contracting officer states that pursuant to paragraph 7-503.2 of the Defense Acquisition Regulation it was the intent of the parties involved that travel, per diem and moving expenses would be allowable to the extent provided in Section 15, Part 2 of the Defense Acquisition Regulation. We do not view the contractual clause set forth at paragraph 7-503.2 of the Defense Acquisition Regulation as providing any authority to allow payment of travel and relocation expenses other than that otherwise allowable by statute and implementing regulations for Government employees including experts and consultants. Furthermore, Section 15, Part 2 of the Defense Acquisition Regulation "Contracts with Commercial Organi-

zations" is by its own definition only applicable to a contract with commercial firms and not with individual experts and consultants. Accordingly, the provisions contained in Section 15, Part 2 of the procurement regulations which authorize reimbursement for the costs of travel expenses of members of the employee's immediate family and transportation of household goods are not applicable to individuals who have entered into an employer-employee relationship with the Government.

Thus, it is clear that Mr. Jones' entitlement to reimbursement for his wife's travel and the transportation of his household goods rest upon the statutory provisions concerning travel and relocation allowances of Government employees including experts and consultants employed by the Government.

As indicated, contract line item 0002 provided that Mr. Jones was to receive travel, per diem and moving expenses from his residence to his regular place of employment. This authorization was apparently predicated upon 5 U.S.C. § 5703 which provides that an expert or consultant serving on an intermittent basis and paid on a per diem when actually employed basis may be allowed travel or transportation expenses including per diem while away from his home or regular place of business. The provision set forth at 5 U.S.C. § 5703 only applies where it is intended that the services are to be rendered by the expert or consultant on an occasional or irregular basis. See 35 Comp. Gen. 90 (1955), and *Hector Avila Morales Jr.*, B-193170, May 16, 1979.

Lines B.1 and B.2 of the contract dated May 20, 1982, provided that Mr. Jones' compensation would be paid on a time basis biweekly and that the cost for each biweekly period would be in the amount of $1,923.08. The contract also shows that the estimated costs for Mr. Jones' compensation for 10 biweekly pay periods was in the amount of $19,230.80 (or ten times the pay rate for each biweekly pay period). The May 20, 1982 contract was subsequently extended from October 1, 1982, through April 30, 1983. The modification indicated that his compensation for the additional 16 biweekly pay periods would continue at the rate of $1,923.08 per pay period since the estimated total compensation for the 26 pay periods was in the amount of $50,000.08 (or 26 times his biweekly rate of pay). In April of 1983 the contract originally entered into on May 20, 1982, was extended for a period of five months from May 1, 1983, through September 30, 1983. The contract modification provided that Mr. Jones would be compensated at the rate of $2,124 biweekly. On October 4, 1983, the May 20, 1982 contract was further extended for seven months from October 1, 1983, through April 30, 1984. This contract modification again provided that Mr. Jones would be compensated at the rate of $2,124 biweekly.

In view of the contractual provisions regarding Mr. Jones' compensation it appears that Mr. Jones was not employed on an inter-

mittent basis but on a regular full-time basis. We have been informally advised by an official of the White Sands Missile Range that Mr. Jones was assigned to work a regularly scheduled tour of duty in a biweekly pay period. Unlike an intermittent expert or consultant, the travel expenses entitlement of an expert or consultant who is employed on a temporary basis is the same as a regular Government employee who is only entitled to travel and per diem expenses when on official business away from his duty station. A temporarily employed expert or consultant, just as a permanently employed individual is subject to the well-settled rule that an employee must bear the cost of transportation from his place of residence to his place of duty at his official station. See 35 Comp. Gen. 90, *supra,* and *Andrew Paretti,* B-191330, December 4, 1978, and decisions cited therein. Accordingly, since it appears on the basis of the record before us that Mr. Jones was employed on a temporary rather than an intermittent basis, 5 U.S.C. § 5703 would not provide a basis to authorize him reimbursement for his transportation and travel expenses for his travel from London to El Paso in May 1982 and for his return travel to London upon the expiration of his contract.

We note that even if Mr. Jones were entitled to transportation and travel expenses pursuant to 5 U.S.C. § 5703, that provision would not authorize the transportation of his family and household goods at Government expense.

Generally, a Government employee is responsible for his travel and relocation expenses to his first duty station. 53 Comp. Gen. 313 (1973). However, 5 U.S.C. § 5723 (1982) provides that an agency may pay the travel expenses of a new appointee if appointed to a position in the United States for which the Office of Personnel Management has determined that there is a manpower shortage. Transportation expenses of his immediate family and his household goods is also authorized.

Although the record does not indicate that Mr. Jones was appointed to a manpower shortage position, the Office of Personnel Management has determined that a shortage existed nationwide for all operations research analyst positions. See Appendix A of Federal Personnel Manual Chapter 571. Paragraph b of Appendix A provides that although the list of manpower shortage positions as set forth in Appendix A is arranged by occupational groups and series established under the General Schedule classification system, comparable positions not subject to that system also are covered. Accordingly it appears that the position occupied by Mr. Jones would be a manpower shortage position.

By virtue of the Army's authority to employ experts and consultants pursuant to 5 U.S.C. § 3109 and in view of the employer-employee relationship between Mr. Jones and the Government, he would be considered an "appointee" for purposes of reimbursement

under 5 U.S.C. § 5723. Cf. 25 Comp. Gen. 731 at 733 (1946) and B-167815(1), January 13, 1970.

Accordingly, if the Army determines that Mr. Jones should be reimbursed under 5 U.S.C. § 5723 as an appointee to a manpower shortage position, we would have no objection. See B-164720, August 5, 1968. Under 5 U.S.C. § 5723, Mr. Jones would be entitled to payment of his travel expenses including per diem, from London to El Paso together with reimbursement for the transportation of his dependent wife and his household goods to El Paso provided that reimbursement was otherwise proper under the applicable travel regulations. He then would not be indebted for his travel and the transportation of his wife and household goods from London, England, to El Paso, Texas. However, section 5723 does not provide authority for reimbursing an employee for return travel and transportation costs for travel from his duty station to his previous residence. Mr. Jones would not be entitled to reimbursement for his travel expenses and the transportation of his wife and household goods from El Paso to his residence in England.

We note that contract line item 0003 provided that Mr. Jones would be authorized per diem in lieu of subsistence for each day he was in a travel status away from his regular place of employment, other than travel covered by contract line item 0002 (travel from his residence to his regular place of employment). Such reimbursement was to be in accordance with the Standardized Government Travel Regulations (now the Federal Travel Regulations, FPMR 101-7). As a temporary consultant, Mr. Jones was not entitled to authorization of per diem at his official duty station, the White Sands Missile Range. See *Hector Avila Morales Jr.,* B-193170, *supra,* and decisions cited therein. We have been informally advised that Mr. Jones was not authorized or paid a per diem while at the White Sands Army Missile Range but that he was authorized travel expenses, including per diem, while assigned to various temporary duty stations. Such reimbursement would be proper provided that such payments of travel expenses and per diem were made in accordance with the Federal Travel Regulations (FPMR 101-7) and Volume 2 of the Joint Travel Regulations.

LEAVE ACCRUAL

We are also asked whether Mr. Jones is entitled to accrual of leave benefits under the contract as an employee of the Government.

Line H.9.1 of Mr. Jones' contract provided that he is entitled to accrue annual and sick leave in accordance with the regulations and instructions implementing the Annual and Sick Leave Act of 1951, as amended (5 U.S.C. §§ 6301-6311). We have held that an expert or consultant whose services are secured under 5 U.S.C.

§ 3109 on an employment rather than an independent contractor basis is entitled to annual and sick leave insofar as he is eligible under the applicable provisions of chapter 63, subchapter 1, title 5, United States Code. See *Copp Collins*, 58 Comp. Gen. 167 (1978). The annual and sick leave provisions at 5 U.S.C. §§ 6301–6311 do not apply to "a part-time employee who does not have an established regular tour of duty during the administrative workweek." See 5 U.S.C. § 6301(2)(B)(ii). See *Copp Collins*, 58 Comp. Gen. at 168. Accordingly, only those experts and consultants with an established tour of duty are entitled to the accrual of annual and sick leave. *Copp Collins*, 58 Comp. Gen. 167 and *Dr. David Pass*, B–194021, February 11, 1980.

Since the terms of the May 20, 1982 contract entered into between Mr. Jones and the agency appear to have contemplated that Mr. Jones would work on a regularly scheduled basis during each biweekly pay period, and since we have been informally advised that such was the case, it appears that he would be entitled to the accrual of annual and sick leave in accordance with 5 U.S.C. §§ 6301–6311, where otherwise proper.

LUMP-SUM LEAVE PAYMENT

We note that line H.9.4 of the contract provided that Mr. Jones may be paid a lump sum for his unused annual leave at the end of the contract. The certifying officer, citing 33 Comp. Gen. 528 (1951) notes that lump-sum payment for unused annual leave to contract employees is improper. Our decision in 33 Comp. Gen. 528 which involved a contract employee did not hold that lump-sum payment for unused annual leave may not be paid to contract employees. Rather, that the case applied the general rule that when an employee transfers between positions covered by subchapter 1 of chapter 63 of title 5, United States Code, the agency from which he transfers shall certify his annual leave account to the employing agency for credit or charge. See 5 C.F.R. § 630.501 (1984). We are not aware of anything which would prohibit the payment pursuant to 5 U.S.C. § 5551 of a lump sum for unused annual leave upon the separation from Government service of an expert or consultant who was entitled to the accrual of leave as a Government employee.

PAYMENT FOR HOLIDAYS

We are also asked whether Mr. Jones may be paid for days on which he did not work due to a holiday. Line H.9.7 of his contract provided that he shall be paid for holidays or non-workdays "established by Federal Statute or Executive or Administrative Orders."

An expert or consultant employed under the authority of 5 U.S.C. § 3109 is entitled to compensation for holidays on which no work is performed provided that the contract of employment or appointment papers specifically provides for holiday pay. See 28 Comp. Gen. 727 (1949), B-131457, September 19, 1962, and January 24, 1963, and *Carlyle P. Stallings*, B-131259, January 23, 1976. Since Mr. Jones' contract specifically provided that he would receive compensation for those holidays on which he did not work he is entitled to receive compensation for such days of nonwork, if otherwise proper.

DOCUMENTATION OF EMPLOYMENT

We note that the Army may have not properly documented Mr. Jones' employment by contract. The instructions in Chapter 304 of the Federal Personnel Manual on the employment of experts and consultants are applicable to individual expert or consultant services procured by contract if an employer-employee rather than an independent contractor relationship is created. See Subchapter 1-1a of Chapter 304 of the Federal Personnel Manual. Paragraph A-4 of Appendix A to Chapter 304 requires that the agency establish an official personnel folder for each expert or consultant employed, full-time, part-time, or intermittently, whether employed by appointment or contract. This official personnel folder must include a Standard Form 50, Notification of Personnel Action, showing the employment. Also see *Carlyle P. Stallings*, B-131259, *supra*. There is nothing in the record which indicates that a Standard Form 50 documenting Mr. Jones' employment was prepared. In the future, the Army should ensure that it complies with the requirements of Chapter 304 of the Federal Personnel Manual where an expert or consultant is, in effect, an employee of the Government, regardless of whether that relationship was created by means of a formal contract. See B-174226, January 12, 1972, and March 13, 1972.

TIME LIMITATION ON EMPLOYMENT

Lastly, we wish to point out that 5 U.S.C. § 3109 expressly limits the authority thereunder to employ experts and consultants on a temporary basis for a period of only up to 1 year. See 28 Comp. Gen. 670 (1949). Subchapter 1-3c(2) of Chapter 304 of the Federal Personnel Manual expressly provides that an expert or consultant who serves under a temporary appointment in one service year may be reappointed the next year to the same position on only "a purely intermittent basis." Furthermore, that paragraph provides that the subsequent appointment in the next service year must cease "as soon as it loses its occasional or irregular character." We note that even if Mr. Jones' employment as of May 1, 1983, had been on an intermittent basis, Subchapter 1-2(5) of Federal Personnel Manual Chapter 304 provides that when an intermittent expert

or consultant works more than one-half of full-time employment, i.e., he is paid for all or any part of a day for more than 130 days in a service year, the employment automatically ceases to be intermittent and becomes temporary.

Subchapter 1-1(a) of Chapter 304 of Army Regulations 690-300 provides that the provisions at Chapter 304 govern the employment of experts and consultants who are employed under excepted appointment or by contract. The Army's personnel regulations at Chapter 304 provide:

> Reappointment to same position. If an appointee has served in a position for more than 130 days in 1 service year, the individual may be granted approval to serve in the same position for the next year. However, appointment will be on an intermittent basis for no more than 130 days. If, during the second year, the appointment loses its occasional or irregular character, it must be terminated. Subchapter 1-3c(2) of Chapter 304, Army Regulation 690-300, August 15, 1980.

However, during the period of Mr. Jones' employment by contract the provisions in the annual appropriation acts for the Department of Defense provided authority to procure the services of experts and consultants pursuant to 5 U.S.C. § 3109 and also provided that such contracts could be renewed annually.[5]

The Defense Acquisition Regulation, applicable to all Department of Defense components including the Army, provide for the renewal of contracts for expert and consultant services as follows:

> The nature of the duties to be performed must be temporary (not more than one year) or intermittent (not cumulatively more than 130 days in one year). Accordingly, no contract shall be entered into for longer than one year at a time. (However, contracts may be renewed annually; see 22-212.) Section 22-204.2(ii) of the Defense Acquisition Regulation.

Section 22-212.1 of the Defense Acquisition Regulation provides:

> 22-212.1 General. A contract may provide for renewal—for a maximum of one year each time—by written notification to the contractor from the contracting officer.

Consistent with those provisions, section H.8.1 of Mr. Jones' employment contract provided that the contract is renewable at the option of the Government and that such renewal shall not exceed a maximum of one year each time.

While the language of chapter 304 of the Army Regulations indicates that the period of employment in the same position as a temporary expert or consultant should be limited to one year, in view of the authority to the contrary provided in the appropriation acts and the Defense Acquisition Regulation, we will not pursue that matter further in this case. However, the Army should review its regulations and procedures to see that they are consistent and that they are being followed.

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[5] See section 703 of Public Law 97-114, December 29, 1981, 95 Stat. 1565, 1578, section 703 of Public Law 97-377, December 21, 1982, 96 Stat. 1830, 1849, and section 703 of Public Law 98-212, December 8, 1983, 97 Stat. 1421, 1437.

[B-214479]

Interest—Contracts—Delayed Payments by Government—Penalty Payments on Overdue Utility Bills

A regulated public utility's approved tariff constitutes a contract between the parties for service. The Prompt Payment Act and General Accounting Office decisions provide that contract payment terms must be given effect as written, even though the Government's liability for late charges is difficult to avoid due to the very short period designated by the tariff for timely payments.

Matter of: Social Security Administration—Late Payment Charges for Utility Services, July 26, 1984:

By letter dated February 3, 1984 (reference SMF-235), the Director of the Social Security Administration's (SSA) Division of Finance requested our opinion on several problems related to invoices from the General Telephone Company of the Southwest (hereafter GTE).

Southwest, with its parent company, General Telephone and Electronics, is the sole supplier of telephone services in some localities, and it serves SSA field offices in Texas and in other states. To illustrate its problem, SSA cites the Texas General Exchange Tariff, approved by the Texas Public Utility Commission, under the terms of which GTE has assessed late charges on its bills to SSA for fiscal years 1983 and 1984, totalling $7,937.39 as of the date of the request. SSA has been disputing these charges, claiming that the more liberal terms of the Prompt Payment Act, 31 U.S.C. §§ 3901–09 (1982), should control late payments rather than the terms of the tariff. For the reasons explained below, the Texas late charges are properly payable by SSA, and are not contrary to the Prompt Payment Act.

The tariff provides that GTE's commercial accounts are due 15 days after invoices are postmarked (or prepared if no postmark exists). A one time only late charge of 5 percent is assessed on delinquent commercial accounts on the 16th day. The problem is that there is a statutory requirement that long distance charges be certified as official Government business by the agency making the calls. 31 U.S.C. § 1348 (1982). In view of the processing time required in sending invoices to Baltimore for final certification and payment, according to SSA, it is extremely difficult for it to make timely payment and avoid the late charges. Under the Prompt Payment Act, the Government would have 30 days after receipt of the invoice to pay the bills without penalty. The question is whether the tariff provisions or the Prompt Payment Act provisions take precedence in assessing late payment charges.

In 1971, this Office first articulated its current rule that the Government may pay interest on overdue payments or payments delayed by disputes and litigation. 51 Comp. Gen. 251 (1971). Overruling 22 Comp. Gen. 772 (1943), we held that the Government may

bind itself by contract to make payments on designated schedules and to pay interest at a specified rate on delinquent accounts. When supported by a contract or statute, we found appropriations were available to pay the extra costs associated with interest.

We have applied this principle to several cases involving public utilities. For example, in *Western Massachusetts Electric Company,* B-184962, November 14, 1975, the utility had insisted in supplying electricity to the Army Corps of Engineers under its published rate schedule. It refused to enter into a separate contract with the Army which would have waived the late payment charge under its published rate schedule. In the circumstances, we determined that the published schedule was a contract for service and that an invoice for the late charge could be paid. *See also,* B-173725, September 16, 1971.

These cases, of course, predate the Prompt Payment Act, and to the extent that our precedent and the later statute are incompatible, the statute would be controlling. We find, however, that the two are complementary rather than contradictory.

The legislative history of the Prompt Payment Act shows that it was a response to the demands of suppliers and vendors for interest payments on delinquent Government accounts. See, *Hearings on H.R. 4709 Before the Subcommittee on Legislation and National Security of the House Committee on Government Operations,* 97th Cong., 1st Sess., *passim* (1981). Prior to passage of the Act, interest charges for late payments could not be assessed against the Government except where otherwise provided by contract or statute. Since the Government dictates the terms of many contracts, most suppliers to the Government were unable to collect interest on overdue payments.

The Prompt Payment Act provided a statutory right to recovery in cases where Government contracts lacked payment terms and interest clauses. The Act was not intended to supplement existing contracts that contained timely payment and interest provisions. In fact, the Act specifically provides that where a contract spells out a specific payment date, it is the contract date which controls. 31 U.S.C. § 3903(1)(A) (1982).

In the absence of any other agreement, the terms of the Texas General Exchange Tariff must be regarded as being incorporated into the contract for telephone services between SSA's Texas field offices and GTE Southwest. Both the Prompt Payment Act and our cases require that SSA comply with the contract terms for remittance. Thus the more favorable provisions of the Prompt Payment Act (*e.g.,* for a 15-day grace period before interest penalties are due) do not apply where the contract terms provide otherwise.

Furthermore, the regulations issued under the Act themselves exempt all or nearly all public utility contracts from coverage. We

asked the OMB officials who helped draft the implementing regulations published at 41 C.F.R. Part 1-29 (1983) (temporary) why they included a broad exception for utilities. They told us that, in their view, the drafters of the Prompt Payment Act did not expressly take into account regulated public utility services supplied under published rate schedules, and that the exemption was intended to give effect to our cases on this subject. (Those cases are the same ones discussed above.) We agree with that analysis.

We note, from correspondence submitted with the request, that GTE argues that it is entitled to both late charge and to interest under the Prompt Payment Act. The Act provides no authority to compensate a vendor twice for delinquent payments, and thus, we would find such a claim to be improper.

We also note from the submission that some of the late charges questioned date back to fiscal year 1983. Payments for late charges dating from fiscal year 1983 should, of course, be made from 1983 funds.

Finally, the request mentioned several other states in which GTE supplies telephone services to SSA field offices. If the tariffs and public utility codes in those states are substantially similar to those in Texas, and they are otherwise correct these other late charges may also be paid.

[B-214805]

Contracts—Small Business Concerns—Awards—Set-Asides—Administrative Determination

Agency is not required to set aside a procurement for refuse collection services for small business concerns pursuant to Defense Acquisition Regulation 1-706.1(f) where a different agency had previously acquired these services on the basis of a small business set-aside.

Contracts—Awards—Separable or Aggregate—Single Award—Propriety

Agency is not required to separately purchase services where the agency's overall needs can be most effectively provided through a "total package" procurement approach involving award of the total requirement to one prime contractor in view of the relatively small size of the agency's contracting staff.

Matter of: Eastern Trans-Waste Corp., July 30, 1984:

Eastern Trans-Waste Corp. (Eastern) protests the Central Intelligence Agency's (CIA) request for proposals (RFP) No. 84-(PMS)001 for maintenance and operation (M&O) of electronic systems as well as refuse collection and janitorial services at CIA Headquarters.

We deny the protest.

Prior to a recent agreement between the CIA and the General Services Administration (GSA) providing that the CIA has sole responsibility for procuring services of the type to be procured under

the instant RFP, GSA had procured all such services. Thus, Eastern was awarded a contract by GSA in 1983 pursuant to a procurement set-aside for small business for refuse collection at CIA Headquarters. Eastern now contends that since the refuse collection services were previously procured successfully on the basis of a small business set-aside, the CIA must procure the refuse collection services by means of a small business set-aside pursuant to Defense Acquisition Regulation (DAR) § 1-706.1(f), *reprinted in* 32 C.F.R. pts. 1-39 (1983). Eastern also asserts that the CIA should procure the refuse collection services separately from the other services. Eastern further argues that the CIA should conduct the instant procurement on a formally advertised, rather than a negotiated, basis and raises questions concerning the CIA's contracting authority.

DAR § 1-706.1(f) provides in pertinent part:

> Once a product or service has been acquired successfully by a contracting office on the basis of a small business set-aside, *all future requirements of that office for that particular product or service* not subject to simplified small purchase procedures shall be acquired on the basis of a repetitive set-aside. [Italic supplied.]

While the DAR does not apply to the CIA as a nonmilitary agency, *see* DAR § 1-102, the CIA states that it follows the DAR "to the maximum practicable extent." *Cf. Richardson Camera Co.* v. *United States,* 467 F.2d 491 (Ct. Cl. 1972). Accordingly, we consider DAR § 1-706.1(f) to be applicable here.

However, by the express terms of DAR § 1-706.1(f) repetitive set-asides are mandated only where the same contracting office has previously procured the particular service by set-aside. Here, GSA acquired refuse collection services from Eastern on the basis of a small business set-aside, but now the CIA is procuring those services and others under one solicitation. Therefore, we cannot agree with Eastern that DAR § 1-706.1(f) controls the instant procurement. Accordingly, the CIA was not required to set aside the instant RFP for small business concerns under that regulation.

Concerning Eastern's contention that the CIA should procure refuse collection services separately from M&O and janitorial services, Eastern asserts that refuse collection firms carry out separate and distinct functions from firms providing the other services, thus requiring any firm awarded the contract by the CIA for housekeeping purposes to subcontract the refuse collection services. Eastern also claims that Government agencies have uniformly found procurement of each service separately to be satisfactory, and that separate procurements increase the access to competition by small businesses.

The CIA states that it determined that procurement by means of a total package approach would be more effective because it lacks the staff that GSA had to administer the contracts. Specifically, the CIA asserts that GSA had its own crafts and labor force which

could undertake much of the M&O work itself, while the CIA lacks that capability. The CIA also states that, under the total package approach, services will be provided by a single prime contractor directly responsible to the CIA who can secure its own subcontractors and the contract can be more effectively administered by the CIA's relatively small staff.

Generally, it is for the contracting agency to determine whether to procure by means of a total package approach rather than by separate procurements for divisible portions of the total requirement. In the absence of clear evidence that such determinations lack a reasonable basis, they will not be disturbed by this Office. *Ronald Campbell Company,* B-196018, Mar. 25, 1980, 80-1 C.P.D. ¶ 216.

In the instant case, the CIA argues that procurement by means of a total package approach will be more effective than separate procurements because the CIA's relatively small staff is better suited to administering a single prime contractor who secures its own subcontractors than several contractors. Eastern has provided no evidence to show that the CIA's staff can administer several contractors as effectively as one prime contractor. Accordingly, we cannot conclude that the CIA's determination to procure by means of a total package approach lacks a reasonable basis.

Since we have concluded that the CIA was not required to break out the refuse collection services and procure them under a small business set-aside, it is not necessary to address the advertising versus negotiation issue, and other issues concerning the CIA's contracting authority, raised by Eastern.

The protest is denied.

[B-215138]

Bids—Unsigned—Waiver

A bidder's failure to sign its bid may be waived as a minor informality when the bid is accompanied by other documents bearing the bidder's signature, such as a properly executed bid bond, which clearly evidence the bidder's intent to be bound by its submitted bid.

Bids—Unsigned—Irrevocable Letter of Credit as Substitute

Although an irrevocable letter of credit in proper form may constitute an acceptable bid guarantee, it does not negate a bidder's failure to sign its bid in the same fashion as does a properly executed bid bond because it does not require the bidder's signature as a party to the instrument.

Matter of: Cable Consultants, Inc., July 30, 1984:

Cable Consultants, Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DTFA06-84-B50056, issued as a total small business set-aside by the Department of Transportation, Federal Aviation Administration (FAA). The project calls for the installation of underground cables and ducts at

W.B. Hartsfield International Airport, Atlanta, Georgia. The FAA found Cable's low bid to be nonresponsive because the firm had failed to sign its bid, sign its bid bond, and acknowledge receipt of amendment No. 1 to the IFB. Although Cable admits failing to sign both its bid and bid bond, it asserts that its intent to be bound is evidenced by the fact that it submitted an irrevocable letter of credit from its bank in the amount of 20 percent of the bid price as required by the IFB. Additionally, Cable asserts that its failure to acknowledge the amendment was only a minor informality which the agency properly should have waived. We deny the protest.

Page one of the IFB provided that all bidders were required to furnish a bid guarantee in the amount of 20 percent in their bid price if that price exceeded $25,000. Bidders submitting guarantees in the form of bid bonds were required to furnish the original of a properly executed Standard Form (SF) 24, "Bid Bond," listing a surety or sureties acceptable to the Government. Page two of the IFB provided that bid guarantees:

> shall be in the form of a firm commitment, such as a bid bond, postal money order, certified check, cashier's check, irrevocable letter of credit or * * * certain bonds or notes of the United States.

The IFB was issued on March 20, 1984. Amendment No. 1 was issued on April 3, correcting the telephone number of the agency contact with whom bidders were to arrange pre-bid site inspections. Bids were opened on April 19, with Cable submitting the apparent low bid of $39,400. The record establishes that Cable's bid was unsigned, that its bid bond was unexecuted and that Cable had failed to acknowledge receipt of amendment No. 1. In lieu of a bid bond, the firm's bid was accompanied by an irrevocable letter of credit from the First Georgia Bank in the amount of $7,880, representing 20 percent of the firm's bid price. The letter of credit was addressed to the contracting agency and stated, in part:

> We hereby open our irrevocable letter of credit in your favor available by your drafts drawn on First Georgia Bank for account of Cable Consultants, Inc., at sight for any sums not exceeding in total $7,880.00 * * *.

This instrument, which did not reference either the solicitation number or the proposed project, was signed only by an officer of the bank. Thus, no document included with the bid contained a signature of the bidder.

The FAA rejected Cable's bid as nonresponsive on April 25, on the ground that the bid did not offer sufficient evidence of an intent to be bound. Additionally, the FAA deemed the bid nonresponsive because Cable had failed to acknowledge receipt of the amendment. The agency awarded the contract to the second low bidder, but has not issued a notice to proceed with the work pending our resolution of the protest.

The proper preparation of its bid is a responsibility which clearly rests with the bidder so as to ensure that the contracting officer will accept it in full confidence that an enforceable contract will result. See *Edcar Industries, Inc.,* B-212330, Nov. 4, 1983, 83-2 CPD ¶ 528. One element of such preparation is the bidder's signing of the bid document itself. However, there are certain situations when the bidder's failure to sign may be waived as a minor informality when other dispositive evidence accompanies the bid and demonstrates the bidder's intent to be bound by the bid submitted. Federal Procurement Regulations, 41 C.F.R. §1-2.405(c), provides that such evidence may take the form of a bid guarantee, or a letter signed by the bidder clearly identifying the bid itself. In a similar vein, we have held that the presence of a properly executed bid bond may negate a bidder's failure to sign its bid. *Mountain Cascade, Inc.,* B-211460, July 14, 1983, 83-2 CPD ¶ 93.

In this respect, Cable asserts that the irrevocable letter of credit it furnished with its bid as a bid guarantee is adequate evidence of its intent to be bound. The firm points out that the amount of the funds made available to the Government under the letter was exactly 20 percent of its bid price, as required by the IFB, and urges that this instrument thus serves to obviate the firm's failure to sign its bid. We do not agree.

While a bid guarantee may take the form of an irrevocable letter of credit because it assures the Government of access to funds should the bidder fail or refuse to execute required contractual documents or to provide payment or performance bonds, *American Photographic Industries Inc.,* B-209182, Jan. 26, 1983, 83-1 CPD ¶ 94, the letter of credit differs from a bid guarantee in that it does not require the bidder's signature to create a binding obligation. *See* 50 Am. Jur. 2d *Letters of Credit, Etc.* §10 (1970); *cf.* 55 Comp. Gen. 427 (1975) (holding that an unsigned bid bond was acceptable when accompanied by a properly signed bid because the obligation created by the signed bid was sufficient to bind the surety). Thus, even though this instrument may have been acceptable as a bid guarantee, we do not think that it serves as evidence of a firm binding offer that would result in an enforceable contract if accepted by the Government.

As the FAA correctly emphasizes, in the presence of all material contained in the bid package—the bid itself, the bid bond, and the letter of credit—there is simply no document signed by the bidder as demonstrative evidence of its intent to the bound. Without an appropriate signature of the bidder on some accompanying document, the bidder would not be bound upon the Government's acceptance of its bid. See *Inge Ellefson,* B-212785, Sept. 2, 1983, 83-2 CPD ¶ 303. Thus, it is our view that the FAA acted properly in declining to waive Cable's failure to sign its bid as a minor informali-

ty despite the presence of an irrevocable letter of credit, and accordingly in rejecting the bid as nonresponsive.

Since Cable's bid is nonresponsive for this reason, we need not reach the remaining issues raised in the protest.

The protest is denied.

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